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Supreme Court of the United States

October Term, 1958

No. [redacted] 13

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased,

Petitioner,

against

UNION CARBIDE CORPORATION,

Respondent;

against

AMHERST BARGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above matter on May 27, 1958.

Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of West Virginia, Charleston Division (Honorable Ben Moore) in favor of petitioner is unreported and is set out in the appendix to this petition at pages 1a to 6a.

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported to date and is set out in the appendix to this petition at pages 7a to 17a.

Jurisdiction

This action, arising out of a maritime tort, was brought in the United States District Court for the Southern District of West Virginia, Charleston Division, as a civil action predicated upon diversity of citizenship and jurisdictional amount.

The action was later transferred to the admiralty division of said Court by motion.

The decree of the Trial Court in petitioner's favor was appealed by respondent, Union Carbide Corporation (hereinafter referred to as Carbide), and petitioner cross-appealed, *inter alia*, on the question of applicability of the West Virginia statutory monetary limitation of recovery in wrongful death actions.

The judgment of the United States Court of Appeals for the Fourth Circuit, reversing the Trial Court's determination, was entered on May 27, 1958.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. Whether an action for wrongful death and personal injuries arising out of a maritime tort and within the Admiralty and Maritime jurisdiction as conferred by the Constitution of the United States, the remedy afforded by a state Wrongful Death Statute, is limited by the common law concept of assumption of risk as a complete bar to recovery and is subject to the state statutory monetary limitation of recovery.

2. Whether a shipowner's duty to provide a safe place to work to a business invitee extends to obvious unsafe and negligent conditions aboard the vessel.

3. Whether state legislation may create a remedy to recover damages for the wrongful death of a maritime worker caused by breach of the warranty of seaworthiness, such doctrine existing as a concept of the general maritime law.

4. Whether the shipowner's warranty of seaworthiness continues with respect to maritime workers employed by a contractor during a periodic "minor repair" operation.

5. Whether the appellate Court may reverse the Trial Court's findings of lack of assumption of risk of a negligent condition by a further unsupported ruling that it was obvious and outside the owner's duty to correct; and of the vessel's unseaworthiness after delivery to a contractor, where the higher Court confirmed the existence of the condition at the time of delivery of the vessel to the contractor.

6. Whether the general maritime law permits a cause of action for wrongful death.

Statutes Involved

The petitioner as administratrix sued to recover money damages for wrongful death and personal injuries sustained within the Admiralty and Maritime jurisdiction, as supplemented by the Wrongful Death Statute of West Virginia, § 5474(5), the relevant section which reads as follows:

> "§ 5474. (5) Action for Wrongful Death.—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the

death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. * * * "

The respondent, Carbide, asserted the applicability of § 5475(6), of the West Virginia Statutes, which reads thusly:

"§ 5475. (6) Party Plaintiff in Such Action; Damages; Distribution; Limitation:— * * * In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars; Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. * * * "

Statement of Facts

The facts are set out in the opinion of the United States Court of Appeals with the additional bracketed matter inserted by the writer.

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union Carbide & Carbon Corporation, fell into the Kanawha River and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge [when in transit], it had no life rings or other rescue equipment.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring.

It had no railings around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys [when in transit], and it is not customary for such barges to be so equipped [for actual navigation]. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers. [The Trial Court found, as a finding of fact, that the barge was not an unmanned barge at the time of Goett's death.]

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virgina. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. [The purchase order contract called for painting and minor repairs at the total price of $4,712.60 (R. 559-560). Carbide conceded that they were indeed minor in its answer to plaintiff's interrogatories, #24.] The work was to be done in accordance with Carbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with

Amherst's maintenance superintendent, to point out and discuss the work that was to be done. [The vessel was then afloat].

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat, which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp, which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sandblaster and was also wearing a respirator. He was not wearing a life jacket [concededly hazardous to the wearer (p. 197, Vol. II of trial minutes)], although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. [There was no evidence that Goett knew of their existence. Other employees aboard the barge had no knowledge of their existence or availability (pp. 128, 132, 140, 141, 146, Vol. I of trial minutes)]. The great majority

of Amherst's employees preferred not to wear life jackets, and they were not required to do so [because of the danger involved]. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off [due to panic] and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superintendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

[The manner of obtaining the life buoy on the digger boat, which was not thought of by the various workers in the excitement of the moment (p. 97, Vol. I of the trial minutes), was explained by Martin, Amherst's superintendent—to run 160 feet from where Goett fell to the edge of the barge, step from the barge to a ramp 12 feet wide, step over a guard rail to a stairway of 11 steps and then go 15 feet to the preserver and finally retrace the entire route holding the preserver (pp. 57-60, Vol. II of the trial minutes)].

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute. [The action was predicated upon the general maritime law as supplemented by the remedy afforded by the state Wrongful Death Statute] alleging that Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract it was entitled to indemnity. Answers were filed by Carbide and by Amherst, denying liability and raising the

defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the Admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

That Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst,[1]

The opinion of the Trial Court was handed down at the close of the trial on May 13, 1957. On June 24, 1957, further findings and conclusions were incorporated in a letter by the Trial Judge to counsel for all parties.

On August 24, 1957, a decree was entered awarding the petitioner the sum set forth above.

On September 23, 1957, Carbide appealed from the decree and on October 1, 1957; petitioner cross-appealed.

Petitioner's motion for certification of the questions involved in the cross-appeal was denied on March 3, 1958.

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[1] Close of facts set forth in the Court of Appeals' opinion.

Argument of the appeal and cross-appeal was heard on April 9, 1958, in the United States Court of Appeals for the Fourth Circuit before Chief Judge Sobeloff, Circuit Judge Soper and District Judge Thomsen.

The opinion of the Court, by District Judge Thomsen, was filed on May 27, 1958.

On a second motion for certification of the questions, denied on June 18, 1958, the mandate to the District Court was stayed pending the timely filing of this petition for writ of certiorari.

Reasons for Granting the Writ

1. The United States Court of Appeals for the Fourth Circuit, in applying the harsh common law concept of assumption of risk under the law of West Virginia, acted in conflict with decisions of the Courts of Appeals for the Second Circuit (*Halecki* v. *United*, 251 F. 2d 708, wherein Honorable Learned Hand, long acknowledged as among the most brilliant of jurists, stated that such application would be "to the last degree capricious and irrational") and for the First Circuit (*O'Leary* v. *United States*, 215 F. 2d 708, wherein the Court held that the distinction between personal injury and wrongful death actions was incongruous, that it would "create divergence in a field where uniformity has long been considered important"). The Court's decision advanced the very capricious and irrational distinctions between actions for personal injuries and wrongful death that this Honorable Court and others throughout the nation, as well as legislatures of every state, have uniformly sought to negate.

This Court has now granted petitions for writ of certiorari to the United States Court of Appeals for the Second Circuit in *Halecki* v. *United, supra* and to the United States Court of Appeals for the Third Circuit in *Skovgaard* v. *M/V Tungus*, 252 F. 2d 14.[2]

[2] Argument of both cases scheduled for a date during the fall months of this year.

Both matters for wrongful death arising out of a maritime tort, the remedy grounded upon a state Wrongful Death Statute, were factually similar to the instant matter giving rise to the same or similar issues presented herein, and involved the question of extent of a shipowner's obligations under negligence and seaworthiness concepts to employees of an independent contractor, the applicability of general maritime law or common law principles with respect to defenses of assumption of risk and contributory negligence, the availability of the state Wrongful Death Statute as a remedy in an action predicated, *inter alia*, upon the breach of the warranty of seaworthiness and the existence and availability of said warranty to the employees of the contractor during a ship's business operation other than loading or unloading the vessel.

The Court below, in the case at bar, diametrically opposed the position taken by Honorable Learned Hand for the majority bench in the *Halecki* case, *supra*, and that taken by the majority of the Court in the *Skovgaard* matter.[3]

The concept of assumption of risk as a complete bar, peculiar only to common law jurisdictions, has been uniformly rejected by Admiralty Courts. *Panama* v. *Johnson*, 289 F. 964, aff'd 264 U. S. 375; *Sanford* v. *Caswell*, 200 F. 2d 830; *Becker* v. *Waterman*, 179 F. 2d 713; *Armit* v. *Loveland*, 115 F. 2d 308; *The Secandbee*, 102 F. 2d 577; *Pittsburgh* v. *Palo*, 64 F. 2d 198; *The Calvert*, 51 F. 2d 494; *New Berne*, 80 F. 2d 244, extended to maritime workers, *Imperial* v. *Drlik*, 234 F. 2d 4.[4]

Stressing the incongruity which would result from an application of common law principles in an action within the

[3] To be discussed in subsequent points herein.

[4] Under the Jones Act, 46 U. S. C. § 688, the doctrine has been completely destroyed, the sole test being that of comparative negligence in cases where the seamen have a free choice of safe or unsafe gear and voluntarily choose the dangerous appliance. *Socony* v. *Smith*, 305 U. S. 424.

Admiralty and Maritime jurisdiction, the state Wrongful Death Act does not set forth the principles to be employed in land death actions regarding the defense of assumption of risk, but applies the common law solely because the state is governed by common law concepts, the defense of assumption of risk acting as a complete bar to recovery in wholly non-maritime matters following naturally in death actions as it would in those for personal injuries. The decision by the Court of Appeals in the case at bar would enforce a defense alien to and tending to stifle the liberal concept of comparative negligence, established as the prevailing law in the Admiralty jurisdiction, thus effectively destroying the very uniformity between personal injury and death actions that the state legislature strove for by its passage of the Act.

This Court has repeatedly declared that the locale of the accident (the high seas or navigable waters), establishes the Admiralty and Maritime jurisdiction. In *Atlantic* v. *Imbrovek*, 234 U. S. 52 and *Atlantic* v. *Szczesek*, 234 U. S. 63, companion cases arising out of the same maritime tort, one for personal injuries, the other for wrongful death pursuant to the state statutory remedy, the identic character of both actions was affirmed.

City of Norwalk, 55 F. 98 (discussed with approval by this Court in *Just* v. *Chambers*, 312 U. S. 383), discussed the Wrongful Death Statute of New York and stated that the cause of action was still the creation of the maritime law, that the state statute gave rise only to a right of action, but that the case was no less maritime in its essential.

> "The state statute does not create the *cause* of action. It does, indeed, create a new *right*, and liability; but it does not create a single one of the elements that make up the fundamental cause of action, that is, the essential grounds of the demand. All these elements exist independently of the statute, and are not in the least affected by it. It no more creates the wrong, or the damage, than it creates

> the negligence or the death; nor does it, as in the pilotage and double wharfage cases, add anything to the damages sustained. It authorizes no recovery except for 'the pecuniary damages' already existing. It is apparent, therefore, that, as suggested by Mr. Justice Clifford in Steamboat Co. v. Chase, 16 Wall. 532, the statute does no more than 'take the case out of the operation of the common-law maxim that an action for death dies with the person.'
>
> The effect of the statute is to attach a new legal right and responsibility to a purely maritime transaction. But that does not make the case in its essential nature any the less a *maritime* case. Nor does the enforcement of the statute extend the jurisdiction of the court, any more than the giving of damages for the first time for injuries to a cargo of dynamite or petroleum would be an extension of jurisdiction because those articles were new to commerce" (p. 109).

To the same effect is *Chelentis* v. *Luckenbach*, 247 U. S. 372, wherein this Court stated:

> "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury" (p. 384).

Great Lakes v. *Kierejewski*, 261 U. S. 479, affirmed the existence and superiority of the Admiralty jurisdiction in death actions due to a tortious act in a maritime locale. See also: *Robins* v. *Dahl*, 266 U. S. 449; *Gonsalves* v. *Morse*, 266 U. S. 171; *Baizley* v. *Span*, 281 U. S. 222; *The Jefferson*, 215 U. S. 130.

The Admiralty and Maritime jurisdiction is conferred upon the federal power by the Constitution and is superior to the law of the several states, taking from the lesser politic body "all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations." *Knickerbocker*

v. *Stewart*, 253 U. S. 149; *Lottawanna*, 88 U. S. 558; *Workman* v. *New York*, 179 U. S. 552; *Benedict on Admiralty*, Vol. I, §§ 1, 10.

The Admiralty jurisdiction being superior as one of a special class of powers conferred by the Constitution, this Court has repeatedly declared its paramount status, further holding that while state law may at times supplement or modify the general maritime law, it cannot contravene the essential purpose of, work material prejudice to, or interfere with its characteristics or the harmony and uniformity of said law in its international and interstate relationships. *Just* v. *Chambers*, 312 U. S. 383; *The Roanoke*, 189 U. S. 185; *Washington* v. *Dawson*, 264 U. S. 219; *Spencer* v. *Hicks*, 285 U. S. 502; *Union* v. *Erickson*, 248 U. S. 308; *DiSanto* v. *Pennsylvania*, 273 U. S. 34. See also: *Jansson* v. *Swedish*, 185 F. 2d 212; *Rogers* v. *City*, 285 F. 362; *Kuhn* v. *City*, 274 N. Y. 118; *Riley* v. *Agwilines*, 296 N. Y. 402; *McFall* v. *Belge*, 304 N. Y. 314.

This Court, in *Robins* v. *Dahl*, *supra*, asserted that claims affecting maritime workers and the scope of their rights and liabilities were within the Maritime jurisdiction and were not of local concern. See also: *Gonsalves* v. *Morse*, *supra*; *Baizley* v. *Span*, *supra*; *Jefferson*, *supra*.

Pope & Talbot v. *Hawn*, 346 U. S. 406, discussing the defense of contributory negligence as a complete bar or in mitigation of damages, averred that even a state created remedy would be controlled by the substantive general maritime law.

> "(a) The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a dis-

credited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.

(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, 'a type of action which the Constitution has placed under national power to control in "its substantive as well as its procedural features. * * * "' *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to *enforce a state created remedy for this right, federal maritime law would be controlling. While states may some time supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.* These principles have been frequently declared and we adhere to them. See e.g., *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-246, and cases there cited." (pp. 408-410) (italics ours).

O'Leary v. *United States*, 215 F. 2d 708, following the principles laid down in the *Hawn* case, declared the supremacy of the maritime law over state common law doctrines even as to wrongful death actions arising out of maritime torts which occurred on navigable waters within territorial waters of a state.

The United States Court of Appeals for the Second Circuit, in *Halecki* v. *United, supra,* followed the interpretation of the *Hawn* decision as stated in *O'Leary* v. *United States, supra.*

The District Court in the case at bar found, as a finding of fact, that Carbide was negligent in failing to provide reasonable safety equipment in order to furnish workmen with a safe place to perform their duties, having knowledge of the conditions that would prevail during the painting and repair operation.

The Court of Appeals agreed that Goett was entitled to a safe place to work, that the failure to provide him with safety and rescue equipment constituted negligence, *Sadler* v. *Pennsylvania*, 159 F. 2d 784. The reversal of liability was predicated solely upon the supposed lack of Carbide's duty to inform Goett of the obvious, negligent condition on the misconceived theory that it was a risk that Goett assumed as a complete bar to recovery under common law principles of law.[5] Thus—the Court of Appeals destroyed this maritime cause of action by erroneously following common law principles in derogation of the paramount concepts of the general maritime law as aforesaid.

The Court of Appeals, in ruling that the state monetary limitation was binding upon the Admiralty jurisdiction, was in conflict with the decision of this Court in *Workman* v. *New York*, 179 U. S. 552, a libel by the shipowner resulting from a collision between his vessel, moored at a City dock, and a City owned fireboat. The municipal law limited liability against the City. This Court upheld the doctrine that the general maritime law as a Constitutional grant of power controlled the issue of monetary limitation, that to permit local law to limit recovery would be destructive of the essential characteristics and uniformity and harmony

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[5] The Court's ruling that Carbide had no duty except to warn of latent defects was nothing more than the reverse of the archaic and discarded common law doctrine that there was no duty to warn of the obvious, that the victim assumed the risk of an openly defective condition.

The District Court found that Goett did not assume the risk of lack of rescue equipment.

of the Admiralty jurisdiction, which would result in the "practical destruction of a uniform maritime law."

> "The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal Government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution. It would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels." (p. 558)

* * *

> "* * * In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a State can deprive of all rights to relief, in a case where redress is afforded by the maritime law and is sought to be availed of

in a cause of action maritime in its nature and depending in a court of admiralty of the United States." (p. 560)

The Thielbek, 241 F. 209, was an appeal in an admiralty suit by shipowners against each other and against the City of Portland, which arose out of a collision. The decree was in favor of one shipowner against the other and the City.

The City was engaged in pilotage and towage service under legislative enactment which had in its charter a limitation of liability of $10,000.

The decree was for a sum greater than the limitation.

The Court, in affirming, held that local law or statutes could not abrogate or limit the amount of damages recoverable under the maritime law in a suit properly before an Admiralty Court.

See also: *Southern* v. *Jensen*, 244 U. S. 205 and *Knickerbocker* v. *Stewart*, *supra*, in which this Court affirmed the view that the state could not, by legislation, grant a compensation remedy to maritime workers in derogation of their maritime rights; and *Moore-McCormack* v. *Amirault*, 202 F. 893; *Newburgh* v. *Texas*, 227 F. 2d 732 and *New Zealand* v. *Earnmoor*, 79 F. 368, in which the question of interest as a part of recovery of damages was held to be controlled by maritime principles rather than by state legislation.

The petitioner prays that this Honorable Court will take for its consideration the issues presented in this matter, that this cause will be joined in argument with the *Halecki* and *Skovgaard* cases.

2. The ruling of the Court of Appeals is in conflict with the decision in *Halecki* v. *United*, *supra*, in which Honorable Learned Hand, discussed the reponsibility of a shipowner to the employee of the independent contractor after delivery of the vessel and during the repair period. Judge

Hand, in declaring the shipowner responsible for lack of reasonable care in ascertaining the methods and manner of the contractor's activities, held:

> "The deceased was certainly an 'invited person,' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but, although the work was let out to a subcontractor, also for any lack of 'reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities.' Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the 'methods and manner' of its use were proper. So much for the negligence count."

The Court of Appeals herein destroyed the findings of fact of Carbide's negligence solely on the incorrect belief that its duty to Goett was terminated by the simple expedient of delivering a vessel, which it knew would be negligently and defectively equipped for the repair work, to the contractor.

The Court conceded the duty of a shipowner to provide safety and rescue equipment for business visitors during transit, admitted Carbide's knowledge of the lack of such equipment aboard the vessel having notice of the fact that Goett and other employees would be on the vessel in furtherance of its business, pointed out that Carbide's supervisor of barge maintenance went aboard the vessel after delivery and before Goett's death to inspect the ship, which was afloat at the time. The Trial Court had ruled, as a finding of fact, that Carbide did have knowledge that men of Goett's class would be on the vessel for the sandblasting, painting and minor repair operation, and had predicated Carbide's liability upon said knowledge and its obvious indifference to the unsafe condition of the vessel.

Judge Hand rejected the archaic principle of law adhered to by the Court below in the case at bar.

Petitioner respectfully prays that the conflict between the Courts of Appeals for the Second and Fourth Circuits be considered by this Honorable Court in order to fully establish, with finality, the extent of the shipowner's duty to those maritime workers who board its vessels for its benefit and to aid its shipping business.

3. The Court below, because of the nature of its ruling, did not determine whether the state Wrongful Death Statute created a remedy grounded upon the breach of the warranty of seaworthiness, though admitting that there was a division of opinion among the several circuits, citing *Lee* v. *Pure*, Sixth Circuit, 218 F. 2d 711; *Graham* v. *A. Lusi, Fifth Circuit*, 206 F. 2d 223; *Halecki* v. *United*, Second Circuit, 251 F. 2d 708; *Skovgaard* v. *M/V Tungus*, Third Circuit, 252 F. 2d 14.

The question is involved herein if this Court determines that the deceased was within that class of workers to whom the doctrine of seaworthiness was applicable.[6]

The latter two cases now pending argument before this Court and the conflict among the circuits being apparent, petitioner respectfully prays that this Court grant this petition in order to fully determine the issue.

4. The Court of Appeals declared that the warranty of seaworthiness did not extend to the deceased. By its ruling the Court destroyed the effect of this Court's decision in *Pope & Talbot* v. *Hawn, supra*, wherein the doctrine of seaworthiness was extended to a carpenter brought aboard a vessel to repair a defect. The doctrine was thus extended to all classes of workers who were subject to the same

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[6] Discussed in Point 4, *post*.

dangers as those who sailed the ships and were entitled to like treatment.

Coupled with the *Hawn* case, *Alaska* v. *Petterson*, 205 F. 2d 478 aff'd 347 U. S. 396, affirmed that the doctrine was a non-delegable duty and species of strict liability irrespective of fault in holding that surrender of control of the vessel for a shipping operation in furtherance of the shipowner's business did not terminate the owner's duty to provide the same protection to those performing maritime functions, regardless of their employment status. See also: *Rogers* v. *United*, 205 F. 2d 57, rev'd 347 U. S. 984.

The *Hawn* and *Petterson* decisions have been consistently followed. The sole limitation of the extension of the warranty to maritime repair workers concerned major repair jobs (structural conversions) which were not traditionally ship's business. *Berryhill* v. *Pacific*, 238 F. 2d 385; *Berge* v. *National*, 251 F. 2d 717.

In *Halecki* v. *United*, *supra*, the Court of Appeals for the Second Circuit affirmed the doctrine's extension to workers of Goett's class, unequivocally distinguishing its decision in the *Berge* case, when the work to be performed was not major in nature and was of the type traditionally performed by seamen.

A like result was arrived at in *Torres* v. *The Kastor*, 227 F. 2d 664, which involved a worker cleaning the hold from the effect of a previous cargo to make the vessel ready for a new voyage; as it was to a night watchman in *Ross* v. *S.S. Zeeland*, 240 F. 2d 820; and to a worker stripping lumber from a hold in converting the vessel from a merchant to a troop carrying ship in *Read* v. *United States*, 201 F. 2d 758; and to men cleaning the deep tanks of a vessel, *Crawford* v. *Pope & Talbot*, 206 F. 2d 784; and a dock crewman freeing the railroad ties which held the ship in drydock in *Imperial* v. *Drlik*, *supra*; and an electrician who fell off the deck while the ship was drydocked in *Lester* v. *United States*, 234 F.

2d 625; a workman cleaning the ship's generators during an annual overhaul and repair period in *Halecki* v. *United, supra;* and lastly to a maintenance foreman fixing a discharge pump in *Skovgaard* v. *M/V Tungus, supra.*

Thus—the decision in the case at bar is in conflict with determinations of this Court and various Courts of Appeals and in fact is in conflict with its own previous decisions.

The narrowing of the doctrine's applicability solely to periods of loading and unloading of vessels for all practical purposes destroys the remedy available to maritime workers performing ship's business and permits the shipowner to avoid its responsibility of assuring to those business invitees a seaworthy vessel while in the performance of repairs for the benefit of the shipowner.

The Court below conceded that the repairs herein were of a minor nature, lesser in extent than in the *Berryhill* or *Berge* cases or in *Raidy* v. *United States,* unreported as yet (involving structural changes while in drydock), yet negated the doctrine's applicability because the operation in progress at the time of Goett's death was that of sandblasting rather than loading or unloading of cargo from the vessel. The distinction, the petitioner submits, is invalid and the Court's ruling erroneous.

The same issues were presented in both the *Halecki* and *Skovgaard* cases. As such the petitioner again respectfully submits that this matter be joined therewith for argument in order to more fully determine the questions similarly involved in the three causes.

5. The Court below in arbitrarily reversing the findings of facts of the Trial Court acted in a manner contrary to the decision of this Court in *McAllister* v. *United States,* 348 U. S. 19, which declared that unless "clearly erroneous"

the findings of fact of the Trial Court should not be disturbed.

The Trial Court herein ruled that Carbide, having knowledge of the conditions that would prevail aboard the vessel failed to take reasonable care and measures to insure the safety of business invitees. The Court further ruled that the vessel was unseaworthy at the time of Goett's death.

The Court below found the unsafe condition to be present but ruled that Carbide's duty to equip the vessel with safety and rescue equipment terminated when it delivered the vessel to Amherst. Judge Learned Hand clearly and concisely disposed of the same question in refusing to permit a shipowner's duty to end without taking reasonable care to ascertain that the contractor's work would be carried out in a proper and prudent manner, *Halecki* v. *United*, *supra*, and concluded that the question of whether the shipowner showed reasonable care was one of fact, to be determined by the triers of the facts.

The Court below, conceding that the lack of equipment aboard the vessel at the time of Goett's death was due to negligence, petitioner submits that the factual issue was affirmed by the Court, but was erroneously qualified by an incorrect expression of Carbide's duty to Goett (and others of his class).

Further—the Trial Court found that the vessel was unseaworthy, that it was not unmanned at the time of Goett's death. As such, the Coast Guard requirements during transit were inapplicable (aside from the fact that the suit had not been brought on the ground of statutory violations).

The ruling of the Court below that the vessel was not unseaworthy was evidently based upon the erroneous assumption that a seaworthy vessel during transit cannot be-

come unseaworthy after delivery to a contractor for repair, citing *Lester* v. *United States, supra.*[7]

The reasoning of the Court below is in conflict with the decisions of this Court in *Alaska* v. *Petterson* and *Rogers* v. *United, supra,* in which the "relinquishment of control" doctrine was conclusively abolished. In ruling otherwise, the Court below herein once again demonstrated its failure to understand the basic concepts of the general maritime law, evolving from the duty to seamen to expand and incorporate its protective coverage to those workers who, because of modern industrial decentralization methods of performance of ship's business, face the same dangers as those who sail the ships.

Petitioner respectfully submits that the Appellate Court's decision is contrary to the settled weight of the prevailing law, that the finding of fact of the Trial Court of the vessel's unseaworthiness was correct, that it was abundantly proved by the conceded, total absence of rescue equipment aboard the vessel when Goett met his death.

6. In 1886 this Honorable Court in *The Harrisburg,* 119 U. S. 199, considered the question of whether a suit *in rem* would lie for the death of the first officer of a vessel off the coast of Massachusetts. The vessel was registered out of Philadelphia. Both Massachusetts and Pennsylvania had wrongful death statutes having a one year statute of limitations. The suit was brought by the widow five years after the death of her husband.

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[7] *Lester* v. *United States* involved nothing more than a factual ruling by the Court of Appeals that the Trial Court was incorrect in finding that a repair contract calling for replacement of a railing, *per se,* rendered the vessel unseaworthy if an accident occurred involving the absence of the railing. The appellate court expressly ruled that the doctrine of seaworthiness was applicable during the repair period. As such, the *Lester* case is diametrically opposite to the ruling of the Court of Appeals in the case at bar.

The Court stated the issues to be:

> (a) Whether a death action would lie in Admiralty in absence of a Federal or State statute;
>
> (b) If not, whether an action would lie when a right of action was given by a State statute, and
>
> (c) If so, whether the State statute of limitations would prevail?

The Court then fully discussed a number of decisions which had recently (at that time) determined the question. Those cases which had decided in favor of an abatement had done so on the basis of the death maxim under the common law; those which had ruled against the abatement had done so on the basis of inherent justice and equity principles of the maritime law.

Admitting that under Scottish or French law a recovery would be permitted (pp. 212-213), the Court ruled that there was no evidence presented of a different death maxim in Admiralty than on land in any country, that since the Court had the right only to declare what the law was and not what it should be, there could be no recovery.

As such, the basis of the Court's decision was that maritime law was the same as the common law,[8] and that, although there were numerous cases to the contrary, based upon justice and the equity of the situation, the Court did not have the power to determine the law upon social policy.

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[8] Of note was the statement that Lord Campbell's Act of England did not (at that time) permit a suit in Admiralty, citing *Vera Cruz*, 10 App. Cas. 59, which Act has since been revised to permit such cause of action.

Whether the Court's decision would have been the same had the English Lord Campbell's Act permitted a suit in Admiralty at that time, as it now does, is indeed questionable.

The Court did not appear to take into consideration the fact that some of the states did not follow the common law.

The Harrisburg is the leading case and is, in fact, the basis for the doctrine, as we know it today, of abatement of the cause of action at death under the general maritime law. Cases since *The Harrisburg*, almost without exception when upholding this harsh principle, cite it as controlling of the question.

Petitioner respectfully submits that this Honorable Court should now reconsider this entire question to determine whether the force and effect of this 72 year old decision should now be negated in light of the vast changes of moral and legal thought which have permeated every phase of the general maritime law since that time. The modern Admiralty suit was first perfected by the Roman law and is similar to the civil law as it is still practiced by countries subject thereto.

When the *Harrisburg* decision is read in light of the historical background of the law, it would appear that the Court was not duly apprised of the many other sources of law from which the maritime jurisdiction of the different nations and American colonies had developed. The Court looked only to the common law in determining the scope of the general maritime law, the *one* legal system which violently opposed the general maritime law. It cannot be contradicted that the maritime law was taken by the English from the Codes of nations which had perfected legal theory centuries before English civilization progressed from the age of savagery.

The principle of abatement of a cause of action by death was but a corollary principle arising out of the tort theorems of feudal England that "trespass" was of intentional character and was to be repaid by the "an eye for an eye" doctrine of revenge.[9] As such, "death was the great composer of strife."

The Court in its *Harrisburg* decision readily admitted that the doctrine was harsh and unyielding in a system of

[9] A trespass on the case, which eventually evolved into the unintentional tort, was not developed as a legal theorem until a later date.

law grounded upon equity and justice. It freely conceded that a number of cases had determined that a cause of action for wrongful death would lie, based solely upon tenets of righteousness and compassion for the family of the deceased seaman, but felt bound to pursue the policy of the common law in the absence of any evidence that the law of the sea was different than the law of the land. The Court did not attempt to take into consideration those other systems of law, from which the general maritime law, as we know it, most assuredly developed and which, in fact, permitted a cause of action to continue unhampered by the death of the wronged party. The Court further pointedly implied that if it felt free to determine the matter on grounds of justice and equity, an opposite conclusion might well have been reached.

The last 50 years have been extensive legislation concerning the health and safety of workers in the maritime and railroad industries.

The Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, in 1908 granted the right of claim by a railroad worker against his employer for the negligence of said employer. The Merchant Marine Act of 1920 (the Jones Act), 46 U. S. C. § 688, extended the rights granted to the railway employees by the Federal Employers' Liability Act to a seaman against his employer. Neither enactment set forth specific survivor benefits, *The Miramar*, 31 F. 2d 767, aff'd 36 F. 2d 1021.

Congress then effected a cause of action for wrongful death of any person on the high seas, Death on the High Seas Act, 46 U. S. C. § 761, *et seq.*

Passage of the Jones Act in 1920 gave to crew members, to longshoremen and harbor workers, the right of a cause of action against their employer. Thus—from that time and until the enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927, 33 U. S. C. § 901, *et seq.*, a worker such as the deceased herein, had a cause

of action for wrongful death arising out of the negligence of his employer. The coverage for a cause of action for wrongful death of all maritime workers was thus complete whether the accident occurred at sea or on the territorial waters of a state.

It was only upon the passage of the Compensation Act, *supra*, that the newly legislated right under the Jones Act was limited to crew members, as the exception to the coverage of the created Federal Compensation System.

Just v. *Chambers*, 312 U. S. 383, was an action for wrongful death by drowning, arising out of employment on a yacht in the territorial waters of Florida. The Supreme Court discussed whether the Wrongful Death Statute of Florida would be recognized and enforced for the Admiralty Courts and stated, concerning the exercise of the judiciary power in establishing maritime law, that:

> "The rule of the non-survival of a cause of action against a deceased tortfeasor has but a slender basis in admiralty cases in this court. See Crapo v. Allen, 6 Fed. Cas. (No. 3360) 763; Cutting v. Seabury, 1 Sprague 522, 525; In re Statler, 31 F. 2d 767, 36 F. 2d 1021; Cortes v. Baltimore Insular Lines, 287 U. S. 367, 371" (footnote 4, p. 387).

The Court stated that leading continental states, whose law had developed from the civil law, permitted a cause of action arising out of wrongful death. Hughes on Admiralty, Chapter X, Sections 108-110, pages 224-226.

Cox v. *Roth*, 348 U. S. 207, indicated that this Court might reconsider the "slender basis" of the Admiralty rule against survivorship of death action if the issue was properly posed, noting that:

> "Nevertheless, in considering the harshness of the rule sought to be imposed under the Jones Act, we do note that advancing civilization and social progress have brought 43 of our States to include in their general law the principle of the survival of causes

of action against deceased tortfeasors, and that such recovery, rather than being exceptional, has now become the rule in almost every common-law jurisdiction. See the discussion by Roscoe Pound on Death Statutes as Part of the General Law, 13 NACCA L. J. 188-189 (May 1954)" (p. 210).

The Court itself has thus implied that it would consider whether such abatement has retained its vitality in view of the fact that the "slender basis" for the rule of non-survival in Admiralty has been whittled away by legal and social progress to a point where it should no longer form a proper support for an archaic rule in disrepute for many years.

In the recent case of *Kernan* v. *American*, 355 U. S. 426, the Court again appeared to react unfavorably to the effects of *The Harrisburgh* decision, evidenced by a footnote in the decision couched in terms of what seems to be dissatisfaction at the obviously unsatisfactory result of the abatement doctrine.

Admiralty is not a derivation of the common-law but takes its principles from the many legal systems of the maritime world as adopted and accepted by present day legal thought in the United States.

Benedict on Admiralty, Vol. 1, § 8, pages 9-11 stated:

"§ 8. Origin of Admiralty and Maritime Jurisdiction.

Unlike the common law, the American admiralty is not a derivation of English jurisprudence but of the general maritime law adapted to our circumstances and molded by our practice. The admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England—or by the local traditions of that land—but is to be interpreted by an original view of its essential nature and objects and with reference to analogous jurisdictions in other countries constituting the maritime commercial world as well as the jurisdiction in England. Those who framed the Constitution and the lawyers in America in that day were familiar with a jurisdic-

tion different and more extensive in most of the original States when they were colonies than was allowed in England. The general system of maritime law, which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' Admiralty cases are as old as navigation itself and, as they arise, the law, admiralty and maritime, as it has existed for ages, is applied by our courts. The general maritime law, however, is only so far operative as law in any country as it is adopted by the laws and usages of that country. There is no 'mystic overlaw.' It is the maritime law as accepted and received in the United States that governs and, though the general maritime law is the ground work of our own maritime system, it is only by voluntary adoption and with such qualifications as our jurisprudence and statutes have made in it that it becomes our law. It is in this sense—a sense that contemplates both judicial adaptation and legislative modification—that it may be said that the Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law. The precise scope of admiralty jurisdiction is 'not a matter of obvious principle or of very accurate history' but the jurisdiction is of broad scope in this country and the progress of our jurisprudence in freeing the jurisdiction from pre-revolutionary English restrictions and in giving a distinctive character to our maritime law has been marked by the overruling of earlier decisions and the qualification or rejection of earlier expressions of judicial thought" (pp. 9-11).

The recent case of *Bisso* v. *Inland*, 349 U. S. 85, was noted for its affirmation of this Court's scope of power to determine legal issues on the basis of public policy as well as judicial rule, a right it evidently felt it did not have in 1886.

Burnet v. *Coronado*, 285 U. S. 393, discussed the strength of *stare decisis* (dissent opinion of Mr. Justice

Brandeis, since he called for an overruling of a prior decision by the Court). With utmost candidness Justice Brandeis laid down the rule that *stare decisis* should be followed only when results would adequately protect the public.

> "*Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command. 'The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' Hertz v. Woodman, 218 U. S. 205, 212. *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare National Bank v. Whitney, 103 U. S. 99, 102. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. Compare Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 681. Recently, it overruled several leading cases, when it concluded that the States should not have been permitted to exercise powers of taxation which it had theretofore repeatedly sanctioned. In cases involving the Federal Constitution the position of this Court is unlike that of the highest court of England, where the policy of stare decisis was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.
>
> *The reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution.*" (pp. 405-410) (Italics ours)

It would appear that the Federal Courts which have found themselves bound by the common law rule of abatement, have only reluctantly come to that conclusion. The hope of future remedy by judicial decision or legislation of a doctrine that has no meaning in the law as we know it today has often been expressed. It seems apparent that this rigid medieval doctrine based upon the "vendetta" should have no place in the modern conception of justice and equity which has, from time immemorial been the guiding force in maritime matters. By its destruction of claims by means of construction of a fictional difference between a cause of action for a personal injury and one for wrongful death, the death maxim has succeeded in the erection of an artificial barrier to just, equitable and meritorious determinations of death claims.

Surely, Justice Brandeis' decision in the *Burnet* case, *supra*, gives meaning to the law as the shaping force of our nation, alive to the changes and modifications of legal thought and governed only by what has been accepted as the wise rule of action in the light of experience and the force of better reasoning.[10]

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[10] While all states have either wrongful death or survival statutes, or both, the following may have importance in explaining the destruction of the uniformity of the maritime law as a result of variation in the state legislation.

There are 13 states with limitation of maximum benefits and one state with a limitation only as to suits against railroad carriers and municipal departments. Massachusetts, having a limitation, has a penal statute only.

In each state the limitation depends upon the dependency elements and the relationship of said dependency. Some permit recovery for hospital expenses, some for pain and suffering, some for mental anguish of the dependents.

It would seem that the dependency of the general maritime law upon the various state statutes, while on the surface appearing to alleviate the harshness of the common law rule of abatement, basically fails in the purpose in so far as it concerns suits arising out of a maritime tort, since it strikes at the very core of the purpose of the maritime law, uniformity and harmony in its essential characteristic features of international and interstate relations.

Acting upon what petitioner considers to be a directive from this Court, this issue as to whether there shall, in the future, be an abatement of a cause of action arising out of a maritime tort upon the death of the wronged party is herewith most respectfully presented for consideration.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: August 22, 1958.

Respectfully submitted,

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APPENDIX

Findings of Facts and Conclusions of Law of the District Court (Honorable Ben Moore).

The Court: I am going to make a finding of fact and conclusions of law, and in doing so I do not expect to discuss the facts or the law any further than is enough to show an appellate court, if the case should be appealed, the basis on which I rest the findings both of fact and of law.

The findings of fact, then, are these:

First: There was no safety or rescue equipment on the barge from which the plaintiff fell to his death.

Two: It was foreseeable to defendant Union Carbide and Carbon Corporation, as its name was then—is that its name then or now?

Mr. Love: Then. That's the name in the case.

The Court: That in the sandblasting operations which they knew or should have known would be carried on on the barge by Amherst Barge Company for the purpose of the work that was then being done on the barge that many men would work on the barge in the manner Goett was working.

Three: That under these circumstances it was negligence for Union Carbide and Carbon Corporation to omit equipping the barge with reasonably effective and available safety and rescue equipment.

Four: The barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used.

Five: Failure to provide rescue equipment was the proximate cause of Goett's death.

Findings of fact as to damages: the court finds that the amount which is fair and just to cover the intangible damages of the deceased's family, including mental anguish and bereavement, is the sum of $5,000, that in addition to damages for those elements the court finds that the distributees suffered financial and pecuniary loss in an amount exceeding, when added to the $5,000, the sum of $20,000, and that therefore under the rule of law which I apply to this case the amount of damages that are to be included in the recovery is $20,000.

I find that no punitive damages are proper in this case.

Proceeding, as was suggested, to find what would be the recovery in case the limitation set down by the West Virginia wrongful death statute is not applicable, I find these facts with reference to damages: that the reasonably expected annual earnings of Mr. Goett which would have been attributable to the expenses of his family rather than his own expenses, is $1500 a year for the entire expectancy of thirty-six years; and in arriving at that figure I take into consideration the fact that by the time of the expiration of his expectancy Mr. Goett would be a fairly old man and that he could not reasonably be expected, in view of the general health hazards of life, to earn during his entire expectancy the amount that he earned during the immediate week preceding his death, but that he probably would earn an amount for the whole length of time which would average what he made in the six months before his death, which would mean about $2800 a year, and I find that of that sum it would be reasonable to assume that he would use all but $1500 for his own maintenance expenses; so if he earned $1500 a year for thirty-six years, he would in that time earn $54,000 applicable to the expenses of his family.

I think that the present worth of that sum of money should be calculated on a four per cent basis rather than a three per cent basis. Calculated on a four per cent basis, I find that it amounts to $31,400.

I find further that the amount which is fair and just to compensate for the nurture of the deceased's daughter, who was living with him for the period of her infancy, is $5,000; and I further find that the amount which is fair and just to compensate for the pain and suffering of Mr. Goett himself and other intangible losses which are properly compensable under the rules of admiralty is $3600, all of which added together produces a total of $50,000 as the grand total, which would be a fair and just award if there were no limitation as fixed by the West Virginia statute.

Conclusions of law are as follows: I find that this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown, as I have said.

I conclude that it was the duty of the Union Carbide and Carbon Corporation under the circumstances of this case to provide both reasonable safety equipment in order to furnish workmen who worked on the barge a safe place to work, and I am thinking in that connection of measures such as life lines or stanchions, as they are called, to prevent falling off the unprotected deck; and it was also the duty of Carbide to provide reasonably suitable rescue equipment, which it was their duty to place in a position on the barge where it would be immediately available in case of need.

I find further as a conclusion of law that Union Carbide and Carbon Corporation is not responsible for any negligence, if such there was, on the part of Amherst Barge Company in not furnishing to the workmen the life jackets that made up a greater part of the testimony.

On the question of contributory negligence my conclusion is that Mr. Goett was not guilty of any negligence that contributed to his death. I, in explanation of that, conclude that it is the burden of the one alleging contributory negligence to prove that contributory negligence by a preponderance of the evidence.

Under the evidence in this case it is quite possible and just as probable to my mind that Goett may have accidentally fallen without any negligence at all on his part as that he negligently went over the side. There are many constructions on the deck, some of them close to the edge, and he may have struck one of those, and if he did there is no evidence that he was negligent in so doing.

As to the doctrine of assumption of risk, I conclude that under the circumstances of this case Goett did not assume the risk of the danger which caused his death. I think it is not necessary to decide whether he did or did not assume the risk of falling over the side of the boat. It was not the fall that caused his death. The cause of his death, as I have found in my findings of fact, was the failure of Union Carbide and Carbon Corporation to have available rescue equipment, and that is a risk which I conclude Goett did not assume.

The final conclusion of law is that the plaintiff is entitled to recover against defendant Union Carbide and Carbon Corporation in the sum of $20,000. The other findings with reference to damages are cut off by my decision that the limitation in the West Virginia statute applies to this case, so I make no conclusion of law with reference to the excess damages except to say that if my conclusion is correct that the limitation applies, that the plaintiff is therefore not entitled to recover in this action anything beyond $20,000.

June 24, 1957

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In re: Goett, Admx. v. Union Carbide & Carbon Corp.,
v. Amherst Barge Company, a Corp.
Civil Action No. 1755

Gentlemen:

At the conclusion of the hearing in this case which was tried by the Court as a case in admiralty, plaintiff was awarded a judgment of $20,000 against defendant Union Carbide & Carbon Corporation. No decision was made at that time with reference to the rights if any, of that defendant against the third-party defendant, Amherst Barge Company. Counsel for the third-party plaintiff and the third-party defendant were requested to file briefs, which they have done.

In connection with the brief of the third-party plaintiff the Court was asked to make certain findings of fact and conclusions of law.

Requested finding of fact is as follows

"The Court finds that Amherst Barge Company, third-party defendant herein, had exclusive custody, care and control of the unmanned tank barge CC-204 at the time Mr. Goett, plaintiff's decedent, fell therefrom."

I now make this finding of fact, deleting therefrom however the word "unmanned," since it is my opinion that the barge was not at the time an unmanned barge.

Other requested findings, which I deem to be findings of fact but which are requested as conclusions of law, are to the effect that the third-party defendant was negligent in not furnishing a life jacket to Mr. Goett and requiring him to wear it while performing his work; and in not erecting stanchions or railing around the edge of the deck of the barge.

I have already found as a fact that no negligent act of the third-party defendant contributed proximately to cause the death of Mr. Goett. I now further find as a fact that under all the circumstances disclosed by the evidence the third-party defendant was not negligent in not furnishing the life jacket and requiring Goett to wear it. I further find that while the preponderance of the evidence, in my opinion, did not show that the absence of stanchions or railing contributed proximately to Goett's death, the third-party plaintiff, and not the third-party defendant, was negligent in not erecting such stanchions or railing.

Having made these findings of fact, counsel are advised that I have carefully considered the briefs submitted to me, the authorities cited, and the arguments made; and my conclusion of law is that there is no liability from the third-party defendant to the third-party plaintiff arising out of the judgment herein awarded to plaintiff Ellen Goett, Administratrix, etc., against defendant Union Carbide & Carbon Corporation.

It is suggested in the brief of the third-party plaintiff that the court may wish to hear evidence as to whether or not Amherst purchased the insurance required by its contract with Carbide.

I am of opinion that the contract is not in any sense ambiguous, and further, that it is immaterial to the decision of the present controversy whether Amherst did or did not purchase such insurance.

An order may be entered in accordance with the views expressed in this letter.

Yours truly,

BEN MOORE,
United States District Judge.

Opinion of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

UNION CARBIDE CORPORATION, a corporation,
Defendant and Third Party Plaintiff below, Appellant and Cross-Appellee,

versus

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, deceased,
Plaintiff below, Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation,
Third Party Defendant below, Appellee.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

(Argued April 9, 1958 Decided May 27, 1958)

Before:

SOBELOFF, *Chief Judge*, SOPER, *Circuit Judge* and THOMSEN, *District Judge*.

CHARLES M. LOVE (DAYTON, CAMPBELL & LOVE, and CHARLES R. MCELWEE on brief) for Union Carbide Corporation, Appellant and Cross-Appellee; HARVEY GOLDSTEIN (E. FRANKLIN PAULEY and S. ELDRIDGE SAMPLINER on brief) for Ellen Goett, as Administratrix etc., Appellee and Cross-Appellant; and DAVID D. JOHNSON (JACKSON, KELLY, HOLT & O'FARRELL, and W. T. O'FARRELL on brief) for Amherst Barge Company, Appellee.

THOMSEN, *District Judge*:

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union Carbide & Carbon Corporation, fell into the Kanawha River and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge, it had no life rings or other rescue equipment. The principal question to be decided on this appeal is whether Carbide is liable to Goett's administratrix either for negligence or unseaworthiness because the barge was not so equipped.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys [1], and it is not customary for such barges to be so equipped. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned

[1] 14 U. S. C. A. 63; 46 C.F.R. 31.15-5, 32.01-10, 33.40-5 (now 33.40-10).

tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers.

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. The work was to be done in accordance with Carbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat, which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp, which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sandblaster and was also wearing a respirator. He was not wearing a life jacket, although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. The great majority of Amherst's employees preferred not to wear life jackets, and they were not required to do so. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superintendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute,[2] alleging that

[2] W. Va. Code, 1955: "§ 5474. [5] Action for Wrongful Death—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. * * * "

"§ 5475. [6] Party Plaintiff in Such Action; Damages; Distribution; Limitation.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate, left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just not exceeding ten thousand dollars: Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. Every such action shall be commenced within two years after the death of such deceased person."

"§5477. [8] When Action Not to Abate; Survival of Action for Personal Injury against Wrongdoer; Time Within Such Action Must Be Brought.—Where an action is brought by a person injured for damage caused by the wrongful act, neglect or default of any person or corporation, and the person injured dies pending the action, the action shall not abate by reason of his death but, his death being suggested, it may be revived in the name of his personal representative, and the declaration and other pleadings shall be amended so as to conform to an action under sections five and six of this article, and the case proceeded with as if the action had been brought under said sections. But in such case there shall be but one recovery for the same injury. * * * "

Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract, it was entitled to indemnity. Answers were filed by Carbide and by Amherst, denying liability and raising the defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

The judge concluded: "this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown * * *"; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work, and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst.

The maritime law does not allow recovery for wrongful death. *The Harrisburg*, 119 U. S. 199. In 1920 Congress adopted an act to provide a remedy for wrongful death on the high seas, 46 U. S. C. A. 761 et seq., but there is no similar act where the death occurs on inland waters, unless the claim is against the employer of a deceased seaman and therefore covered by the Jones Act, 46 U. S. C. A. 688. The Supreme Court has held, however, that "where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242; *Levinson* v. *Deupree*, 345 U. S. 648, 650. The West Virginia Wrongful Death Act, like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death. *Dunsmore* v. *Hartman*, 140 W. Va. 357, 84 S. E. 2d 137; *Gulf, C & S. F. T. Co.* v. *McGinnis*, 228 U. S. 173; *Continental Casualty Co.* v. *The Benny Skou*, 4 Cir., 200 F. 2d 246, 248, *cert. den.* 345 U. S. 992.

The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted. The endowment must be taken *cum onere*. *The Harrisburg*; *Levinson* v. *Deupree*; *Continental Casualty Co.* v. *The Benny Skou*; *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U. S. 239, 245; *Curtis* v. *A. Garcia y Cia*, 3 Cir., 241 F. 2d 30, 35. It has been generally held that any limitations in the state statute as to when suit must be brought, or the amount and character of damages which may be allowed, are binding on the admiralty court. See e.g. *Western Fuel Co.* v. *Garcia*; *Continental Casualty Co.* v. *The Benny Skou*; *Quinette* v. *Bisso*, 5 Cir., 136 F. 825, *cert. den.* 199 U. S. 606. A cause of action for damages accrued prior to a decedent's death, whether based

on unseaworthiness or on negligence, will survive if the applicable state statute so provides. *Kernan* v. *American Dredging Co.*, 355 U. S. 426, at 430, n. 4; *Curtis* v. *A. Garcia y Diaz H ' and* v. *Steag, Inc.*, D. Mass., 143 F. Supp. 203; *Meade* v. *Lukset jell*, S. D. N. Y., 148 Supp. 708. Cf. *Cox* v. *Roth*, 348 U. S. 207; *Just* v. *Chambers*, 312 U. S. 383. Unlike statutes in some states, the pertinent West Virginia statute permits such survival only if an action has been commenced before the decedent's death, and requires that such action be conformed to an action for wrongful death. W. Va. Code, 1955, § 5477. [8]; *Railing* v. *Case*, N. D. W. Va., 131 F. Supp. 754; *Alloy* v. *Hennis Freight Lines*, 139 W. Va. 480, 80 S. E. 2d 514. Of course, no such action was filed by Goett.

In the instant case liability for Goett's death is claimed on the basis both of unseaworthiness and of negligence.

A. There is a division of opinion whether a suit under a statute like the West Virginia Wrongful Death Act can be based on unseaworthiness. Cf. *Lee* v. *Pure Oil*, 6 Cir., 218 F. 2d 711, 714, and *Graham* v. *A. Lusi, Ltd.*, 5 Cir., 206 F. 2d 223, with *Halecki* v. *United New York*, 2 Cir., 251 F. 2d 708, and *Skovgaard* v. *The M/V Tungus*, 3 Cir., 252 F. 2d 14, noting the strong dissents in both *Halecki* and *Skovgaard*. See also *Kernan* v. *American Dredging Co.*

It is not necessary for us to decide whether a suit in admiralty under the West Virginia Act can ever be based upon unseaworthiness, because Goett was not a person to whom the warranty of seaworthiness ran, and because we do not agree with the finding of the district judge that the barge was unseaworthy.

The right to sue for injuries caused by unseaworthiness, which seamen have had since *The Osceola*, 189 U. S. 158, was extended to stevedores in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 99, because they were "doing a seaman's work and incurring a seaman's hazards", and to carpenters in *Pope & Talbot* v. *Hawn*, 346 U. S. 400, 413, because: "The

ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law." See also *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396, and *Rogers* v. *United States Lines*, 347 U. S. 984. We extended the right to a watchman, supplied by an independent contractor, who was doing work customarily done by an officer or member of the crew. *Ross* v. *The Zeeland*, 4 Cir., 240 F. 2d 820.

Since the decision below, however, this court has adopted the opinion of Judge Chesnut in *Raidy* v. *United States*, D. Md., 153 F. Supp. 777, aff'd, 4 Cir., 252 F. 2d 117, wherein he noted that the admiralty doctrine of unseaworthiness sprang from a consideration of the particular hazards affecting the crew of a ship in navigation. Raidy was a shipyard worker who was performing duties not within the competence or the customary activities of the crew. The ship was in drydock for structural changes; she was not subject to any of the perils of navigation. The crew had been discharged. The owner maintained no control over the work being done by the independent contractor other than the right to inspect to determine whether structural changes were being performed in accordance with the specifications. We concluded that Raidy's status was very different from that of a seaman and that it was a "misnomer" to speak of the removable and absent footplate through which he fell as "unseaworthiness of the ship." 252 F. 2d at 118. See also *Berryhill* v. *Pacific*, 9 Cir., 238 F. 2d 385, *cert. den.* 354 U. S. 938; *West* v. *United States*, E. D. Pa., 143 F. Supp. 473; *Berge* v. *National Bulk Carriers*, 2 Cir., 251 F. 2d 717. Cf. *Halecki* v. *United New York* and *Skovgaard* v. *The M/V Tungus*.

In *Sieracki*, *Hawn* and *Petterson*, the vessels were in the general control of their officers, loading cargo, when the longshoremen and carpenters were hurt. Those cases hold that an owner's duty to provide a seaworthy vessel, with appurtenant supplies and equipment, is not affected by the relinquishment to another, such as a stevedoring company, of control of a portion of the ship or of a particular operation, such as loading.[3] In the instant case, however, the barge had been temporarily withdrawn from navigation and delivered into the sole custody and control of Amherst, the drydock company. While in extent the work was not as great as in *Berryhill*, *Beige* and *Raidy*, in character it was the same, because it could not be done by the regular crew, but required that the vessel be withdrawn from navigation and turned over to a drydock company having special facilities and equipment for the work. The work order called for drydocking of the vessel; without such drydocking the bottom and sides of the barge would not have been inaccessible. The warranty of seaworthiness does not apply in that situation.

The barge was not unseaworthy. In its ordinary operations, it was unmanned, and did not require life saving equipment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case. *Lester* v. *United States*, 2 Cir., 234 F. 2d 625, *cert. den.* 352 U. S. 889.

B. Nor was Carbide negligent in delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix. There is, of course, a duty on a vessel and her owners to have life saving equipment available to rescue members of her crew who fall overboard while the vessel is in operation. *Sadley* v. *Pennsylvania*, 4 Cir., 159 F. 2d 784, and cases cited. A

[3] See discussion in *Alaska S.S. Co.* v. *Petterson*, 205 F. 2d 478, at 479.

similar duty is owed to business visitors who come aboard while the vessel is in the custody and control of her officers or other representatives of the owners. But in the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect. There was no hidden danger or latent defect in the barge. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used. It was Amherst's responsibility to decide whether a temporary railing or stanchions should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted. For negligence in any of these respects it would be liable to plaintiff herein for damages, were it not for the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901-950.[4] But Carbide is not liable to plaintiff for negligence; it breached no duty it owed to Goett. *Lester* v. *United States; West.* v. *United States; Raidy* v. *United States;* 38 Am. Jur., Negligence, sec. 97; Restatement, Torts, sec. 340, 343; Harper and James, *The Law of Torts*, vol. 2, sec. 21.1.

The judgment should have been entered in favor of defendant. This decision makes it unnecessary to pass on the other questions raised by the several parties.

Reversed.

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[4] Under the terms of that Act Goett's wife and children are now entitled to receive, without proof of negligence on anyone's part, compensation which may exceed the maximum amount recoverable under the West Virginia Wrongful Death Act.

Judgment

Filed and Entered May 27, 1958.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

UNION CARBIDE CORPORATION, a corporation, Defendant and Third Party Plaintiff below,
Appellant and Cross-Appellee,

vs.

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased, Plaintiff below,
Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation, Third Party Defendant below,
Appellee.

Cross-appeals from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; that this cause be, and

the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Charleston, with direction to enter judgment in favor of defendant (appellant and cross-appellee here) in accordance with the opinion of the Court filed herein; and that the costs on appeal be paid by the appellee and cross-appellant.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

ROSZEL C. THOMSEN
United States District Judge.

Office-Supreme Court, U.S.
FILED
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 3

ELLEN GOETT, Administratrix of the Estate of MARVIN PAUL GOETT, deceased,

Petitioner,

against

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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On the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 3

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased,

Petitioner,

against

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit (R. 241-250) is reported at 256 F. 2d 449.

Jurisdiction

The judgment of said Court of Appeals was entered on May 27, 1958. The petition for a Writ of Certiorari was filed on August 25, 1958, and was granted on March 2, 1959. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

Questions Presented

1. Whether, in an action for the wrongful death of a maritime worker arising out of a maritime tort, the general maritime law provided a remedy in the absence of a Federal or State Statute, unlike the "death maxim" of the common law.

2. Whether under the Wrongful Death Statute of West Virginia, maritime and not local principles of law were applicable with respect to the issues of assumption of risk and the duties of the litigants.

3. Whether the Wrongful Death Statute of West Virginia provided a remedy for breach of the warranty of seaworthiness.

4. Whether the shipowner, with knowledge that workers were to come aboard its vessel, breached its warranty of seaworthiness by failing to provide safety rescue equipment on the ship upon its delivery to the independent contractor for the work to be thereafter performed.

5. Whether the shipowner's warranty of seaworthiness encompassed employees of an independent contractor after delivery of the vessel for its periodic painting and minor repairs, work traditionally performed by seamen.

6. Whether, in this action for wrongful death of a maritime worker, arising out of a maritime tort and predicated upon the general maritime law as supplemented by the Wrongful Death Statute of West Virginia, the State Statutory maximum monetary limitation was unenforceable as contrary to the essential characteristics of the general maritime law and against its public policy of uniformity in its international and interstate relations.

Statutes Involved

Petitioner, as administratrix, sued to recover money damages for wrongful death and personal injuries grounded upon the Admiralty and Maritime jurisdiction, as supple-

mented by the Wrongful Death Statute of West Virginia, § 5474(5), which read as follows:

> "§ 5474. (5) Action for Wrongful Death.—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. * * *"

Respondent, Carbide, asserted the applicability of § 5475(6), of the West Virginia Statutes:

> "§ 5475. (6) Party Plaintiff in Such Action; Damages; Distribution; Limitation.— * * * In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars; Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. * * *"

Statement

The following facts were set out in the Court of Appeals decision, with additional bracketed matter inserted by the petitioner.

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union Carbide & Carbon Corporation, fell into the Kanawha River

and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge [when in transit], it had no life rings or other rescue equipment.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys [when in transit], and it is not customary for such barges to be so equipped [for actual navigation]. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers. [The Trial Court found, as a finding of fact, that the barge was manned at the time of Goett's death (R. 236-237)].

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. [The purchase order contract called for painting and minor repairs at the total price of $4,712.60 (R. 207). Carbide conceded that they were indeed minor in its answer to plaintiff's interrogatories, #24 (R. 18)]. The work was to be done in accordance with Carbide's written specifica-

tions. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sandblaster and was also wearing a respira-

tor. He was not wearing a life jacket [concededly hazardous to the wearer (R. 154)], although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. [There was no evidence that Goett even knew of their existence. Other employees aboard the barge had no knowledge of their existence or availability (R. 58, 60, 65, 67)]. The great majority of Amherst's employees preferred not to wear life jackets, and they were not required to do so [because of the danger involved]. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off [due to panic] and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superintendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

[The manner of obtaining the life buoy on the digger boat, which was not thought of by the various workers in the excitement of the moment (R. 45), was explained by Martin, Amherst's superintendent—to run 160 feet from where Goett fell to the edge of the barge, step from the barge to a ramp 12 feet wide, step over a guard rail to a stairway of 11 steps and then go 15 feet to the preserver and finally retrace the entire route holding the preserver (R. 101-102).]

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute. [The action was predicated upon the general maritime law as supplemented by the remedy afforded by the state Wrong-

ful Death Statute] alleging that Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract, it was entitled to indemnity. [A petition for limitation in Admiralty was filed by Carbide and was stayed pending the determination herein.] Answers were filed by Carbide and by Amherst, denying liability and raising the defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the Admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

The judge concluded: "this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown * * *"; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work, and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia

Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst.[1]

The opinion of the Trial Court was handed down at the close of the trial on May 13, 1957. On June 24, 1957, further findings and conclusions were incorporated in a letter by the Trial Judge to counsel for all parties.

On August 24, 1957, a decree was entered awarding the petitioner the sum set forth above.

On September 23, 1957, Carbide appealed from the decree and on October 1, 1957, petitioner cross-appealed.

Petitioner's motion for certification of the questions involved in the cross-appeal was denied on March 3, 1958.

Argument of the appeal and cross-appeal was heard on April 9, 1958, in the United States Court of Appeals for the Fourth Circuit before Chief Judge Sobeloff, Circuit Judge Soper and District Judge Thomsen.

The opinion of the Court, by District Judge Thomsen, was filed on May 27, 1958.

On a second motion for certification of the questions, denied on June 18, 1958, the mandate to the District Court was stayed pending the timely filing of the petition for a Writ of Certiorari.

Summary of Argument

1. The "death maxim" of the common law which destroyed a cause of action at the death of either party cannot be socially or morally defended. The abatement rule was not part of the general maritime law as it was and is known in the civil law nations of Continental Europe. Brought into common law England, the Admiralty Courts became a pawn in the struggle for power between Parliament (joined by the judiciary) and the monarchy, result-

[1] Close of facts set forth in the Court of Appeals' opinion.

ing in the eventual subservient position and merger of the ancient Admiralty jurisdiction into the common law of England.

The American colonies, not having accepted the narrow Admiralty jurisdiction as practiced in England and having followed the much wider jurisdictional scope of the ancient maritime law, this Court erred in *The Harrisburgh*, 119 U. S. 199, in holding that the general maritime law of the United States did not afford a remedy for the wrongful death of a maritime worker in absence of a Federal or State Statute.

2. The duty of the shipowner to those business invitees employed aboard its vessel was to afford them a safe place to work. Having knowledge of the conditions which would prevail aboard the vessel after its delivery, the owner had the responsibility to ascertain that the manner and method of completing the work was proper. The question of whether the shipowner acted in a careful manner so as to determine whether the manner and method of performing the work was safe was within the province of the triers of the facts.

The duty of the shipowner was not merely to warn the workers of dangers but to provide the safety required for the operation. The principles involved were those of the general maritime law and not the local common law doctrine. As such, the defense of assumption of the risk was not present since there was no voluntary choice of safe or unsafe condition or method of work given to the workers employed on the vessel.

The shipowner thus failed to provide a safe manner and method of performing the work, knowing of the conditions aboard the vessel at the time. Under the Wrongful Death Statute of West Virginia maritime workers were entitled to the same rights under law as they would have had if only injured. The common law doctrine of assumption of risk was therefore inapplicable. The findings of the District Court should have been affirmed.

3. The Wrongful Death Statute of West Virginia employing the language, "wrongful act, neglect, or default", permitted an action for wrongful death arising out of a breach of the warranty of seaworthiness in accordance with the decision of the Court of Appeals for the Fourth Circuit in *Holley* v. *S.S. Manfred*, decided July 9, 1959 (not reported to date).

4. The vessel was unseaworthy at the time of the death of the decedent, a business invitee, unqualified by the fact that the vessel was delivered by the shipowner to the independent contractor and was under the latter's supervision. The relinquishment of control doctrine has been repudiated by this Court in view of the shipowner's non-delegable, absolute duty to provide a seaworthy vessel. The fact that the vessel was seaworthy during transit did not free the shipowner of the duty after delivery of the vessel; nor can the change in the conditions aboard the ship permit the owner to escape liability by delegating the work to others.

5. The duty to provide a seaworthy vessel flowed to the class of harbor workers who were doing work traditionally performed by seamen. The deceased herein was sandblasting the deck of the vessel in prepartion for its being painted. Painting and its prior preparation has always been the duty of various crew members to whom the protection of the doctrine was given. The shipowner's conceded failure to provide the safety rescue equipment was a breach of that duty and was actionable under the Wrongful Death Statute of West Virginia.

6. The right of a State Wrongful Death Statute in supplementing the general maritime law and providing a remedy for the wrongful death had to be accepted with its limitations and conditions, subject however to it not being in conflict with the essential characteristics of the general maritime law in its international and interstate relations. The rule is similar to the right of any *forum* to reject the application of a statute of a foreign *lex loci* against its public policy.

The limitation of maximum monetary recovery was contrary to the public policy of the general maritime law, *Workman v. New York*, 179 U. S. 552, and as such was inapplicable and unenforceable in an action within the Admiralty and Maritime jurisdiction.

ARGUMENT

POINT I

In an action for the wrongful death of a maritime worker arising out of a maritime tort, the general maritime law provided a remedy in the absence of a Federal or State Statute, unlike the "death maxim" of the common law.

The common law "death maxim" calling for abatement of a cause upon the death of either the wronged party or the tortfeasor has played a unique roll in English and American jurisprudence. Petitioner knows of no other rule of law so maligned, more strongly criticized without defense or defenders, so often the cause for legislative effort to effect equitable change.[2]

The abatement rule cannot be morally defended in the Maritime setting. Nor can it be sustained as a proposition of law.

In 1886 this Court in *The Harrisburg*, 119 U. S. 199, considered the question of whether a suit *in rem* would lie for the death of an officer of a vessel off the coast of Massachusetts. The vessel was registered out of Philadelphia.

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[2]2Wrongful Death Statutes of every State, the Federal Employers' Liability Act 45 U. S. C. § 51, the Jones Act 46 U. S. C. § 688, the Death on the High Seas Act 46 U. S. C. § 761 and the many State Compensation Statutes.

The death of a maritime harbor worker aboard a vessel within State territorial waters represents the last area of strength of the "maxim".

Both Massachusetts and Pennsylvania had Wrongful Death Statutes having one year statutes of limitation. Suit was brought five years after.

This Court stated the issues to be:

(a) Whether a death action would lie in Admiralty in absence of a Federal or State statute,

(b) If not, whether an action would lie when right of action was given by a State statute, and

(c) If so, whether the State statute of limitations would prevail?

The Court first conceded that under Scottish or French law (long acknowledged as a leading nation in maritime matters among all non-English speaking peoples, *Benedict on Admiralty*, Vol. 4, §§ 669, 736) recovery would be permitted (pp. 212-213). The question of whether the English maritime law merged with, or succumbed to the demands of, the common law was discussed, the Court holding that no English case could be found stating that the rule in Admiralty differed from that at common law (p. 205).

The question actually raised by the Court was whether the Admiralty was governed by the common law rule in this country. To that end the Court discussed various cases, arriving at the conclusion that the causes permitting a remedy did so on the basis of equity and natural principles of justice and not on any specific rule of law. The Court further held that since no country was shown to have adopted a different rule for the sea from that which it maintained on the land, the rights of persons under the maritime law of the United States were not different from those under the common law (pp. 213-214).

Thus—the Court held that (1) no country had a different rule in Admiralty than in its land legal system; (2) in England the rule in Admiralty was that of the com-

mon law; (3) the United States followed the common law rule on land, therefore it should be followed in Admiralty.

Shrouded in the mists of feudal England, it is now generally believed that the "logic" of the death maxim was rooted in the theory of trespass as an intentional tort, and guided by the "passion of revenge".[3] *Justice Oliver Wendell Holmes, Jr.*, "The Common Law", 1948 Edition, pages 5, 34, 35. As such, "death was the great composer of strife".

Concededly maritime law was brought into England from the neighboring port cities of Continental Europe and came down to us as the law of the sea, *Benedict on Admiralty*, Vol. 4, §§ 665-670, pages 343-358, modified only by the demands of an industrial civilization.

Admiralty principles were perfected and first codified by the Romans, becoming part of the civil law as it was and still is practiced by Continental European Nations. *Benedict on Admiralty*, Vol. 4, § 671, page 358:

> "§ 671. The Civil Law
>
> The admiralty law is indebted for many of its characteristics to the circumstances of the countries in which it was first administered. The countries that earliest reduced the law of the sea to a system, and adopted codes of maritime regulations, having been countries in which the Roman or civil law prevailed, the principles of that great system of jurisprudence were incorporated with, and gave character to, the maritime law; and so much were pure reason, abstract right, and practical justice mingled in that system, and so important was it that the general maritime law should be uniform and universal, that in England, where the common law was the law of the land, the civil law was held to be the law of the admiralty, and the course of proceedings in admiralty closely resembled the civil law practice."

[3] The theory of "trespass on the case" which first distinguished between the intentional and the unintentional tort was not yet developed.

And again at Vol. 1, § 1, page 2:

> "The maritime law is not a branch or outgrowth of the common law but takes its character from the civil law."

In the 14th century, the Admiralty Court was established in England marking, for the first time, any effort by that country to formulate a national maritime law. *Benedict*, Vol. 4, § 672, page 359. The Admiralty jurisdiction became one of the King's Prerogatives, an expansion of the King's position of strength against the power of the common law Courts, which had politically sided with Parliament. Thus was born the central theme of the 16th and 17th century struggle for power between Parliament supported by the judiciary and the monarchy.

The 15th century was marked by a rise in the desire for a powerful Parliament and an increase in the power of the King's Council, as the seat of equitable judicial power to grant relief not afforded by the common law Courts. Parliament strove for the independence of the judiciary from the King's Prerogatives, which would indirectly strengthen its position against the monarchy.

The two century struggle between the common law Courts and the Admiralty in England, resulting in the latter's submission after 1664, has been discussed by text writers and by the judiciary in explanation of its decisions. See: *Benedict*, Vol. 4, §§ 690-699, pages 375-397.

Insurance v. *Dunham*, 78 U. S. 1 on pages 23 and 24 discussed the Admiralty jurisdiction both in England and the United States, describing the result of the strife as follows:

> "Much controversy has arisen with regard to the extent of this jurisdiction. It is well known that in England great jealousy of the admiralty was long exhibited by the courts of common law.

> The admiralty courts were originally established in that and other maritime countries of Europe for the protection of commerce and the administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages, and is essentially founded, as we have said, on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the courts of common law, and why its jurisdiction was so much more crippled and restricted in England than in any other state. In all other countries bordering on the Mediterranean or the Atlantic the marine courts, whether under the name of admiralty courts or otherwise, are generally invested with jurisdiction of all matters arising in marine commerce, as well as other marine matters of public concern, such as crimes committed on the sea, captures, and even naval affairs. But in England, partly under strained constructions of parliamentary enactments and partly from assumptions of public policy, the common law courts succeeded in establishing the general rule that the jurisdiction of the admiralty was confined to the *high* seas and entirely excluded from transactions arising on waters within the body of a county, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on the land, though relating to marine affairs." (pp. 23-24).

The boundaries of Admiralty jurisdiction wildly fluctuated with each succeeding political upheaval. During

periods of broad jurisdiction the law of Continental Europe was observed under civil law principles.[4]

Waring v. *Clarke*, 46 U. S. 441, affirmed that the Admiralty jurisdiction of England had been narrowed by the controversy under the leadership of Lord Coke; that the ancient jurisdiction was much wider than that under the rule of the common law which had emasculated the jurisdictional scope of its enemy.

The American colonies, populated with people who had fled England, were not content to establish their Admiralty jurisdiction upon the oppressive English model. *Benedict*, Vol. 1, § 8. page 9:

> "§ 8. *Origin of Admiralty and Maritime Jurisdiction.*
>
> Unlike the common law, the American admiralty is not a derivation of English jurisprudence but of the general maritime law adapted to our circumstances and molded by our practice. The admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England—or by the local traditions of that land—but is to be interpreted by an original view of its essential nature and objects and with reference to analogous jurisdiction in other countries constituting the maritime commercial world as well as the jurisdiction in England. Those who framed the Constitution and the lawyers in America in that day were familar with a jurisdiction different and more extensive in most of the original States when they were colonies than was allowed in England."

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[4] France held a peculiarly high place of eminence in its Admiralty practice, conforming to the civil law, which was observed by all Christian nations. *Benedict*, Vol. 4, § 669, pp. 355-356. Shortly before the end of the parliamentary struggle during a period of Admiralty ascent the jurisdiction extended to "Unskilful Pilots whereby ship or man perish". *Benedict*, Vol. 4, § 696, pp. 392-396 at p. 395.

Waring v. *Clarke*, 46 U. S. 441 at pages 454-456, compared at length the English Admiralty jurisdiction with that of the several Colonial governments and the general return by the colonies to the much wider ancient jurisdiction, extended far beyond that of common law England, and more specifically in Virginia (involved herein) as follows:

> "Shall it be presumed, also, that the members of the convention were altogether disregardful of what had been the early legislation of several of the States, when they were colonies, upon admiralty jurisdiction and the rules for proceeding in such courts?—of the larger jurisdiction given by Virginia by her act of 1660, than was at that time allowed to the admiralty in England?—that it was passed in the year that the ordinance of the republican government in England expired by the restoration? That ordinance revived much of the ancient jurisdiction in admiralty. It was judicially acted upon in England for twelve years. When it expired there, the enlightened influences connected with trade and foreign commerce, 'and the uncertainty of jurisdiction in the trial of maritime causes,' which led to its enactment, no doubt had their weight in inducing Virginia, then our leading colony in commerce, to adopt by legislation many of its provisions. That ordinance and the act of Virginia have, in our view, important bearings upon the point under consideration. They were well known to those who represented Virginia in the convention. In its proceedings, they had an active and intellectual agency, which makes it very unlikely that they were unmindful of the admiralty jurisdiction in Virginia. In New York, also there was a court of admiralty, the proceedings of which were according to the course of the civil law. Maryland, too, had her admiralty, differing in jurisdiction from that of England." (pp. 455-456).

And in *Insurance* v. *Dunham*, 78 U. S. 1, as follows:

> "This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but

is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England." (p. 24).

The various commissions to New York, Connecticut and New Jersey clearly show that the scope of their Admiralty jurisdiction far exceeded that of England. *Benedict*, Vol. 4, § 711, pages 408-419, and more specifically at page 417:

> "'And likewise with cognizance and decision of wreck of the sea, and of the death, drowning, and view of dead bodies of all persons howsoever killed or drowned, or murdered, or which shall happen to be killed, drowned, or murdered, or by any other means come to their death, in the sea, or public streams, ports, fresh waters, or creeks whatsoever, within the flowing of the sea and high water mark, throughout our aforesaid provinces and colonies, and the territories depending thereon, and maritime parts of the same, and thereto adjacent, or elsewhere within our maritime jurisdiction aforesaid."

The jurisdiction over persons was equal to the demands of Admiralty advocates of earlier days and far broader and stronger than that of England. *Benedict*, Vol. 4, § 716, pages 435-436.

And so it continued in the various states under the Articles of Confederation, *Benedict*, Vol. 4, §§ 720-724. As to the extent of the jurisdiction in Virginia:

> "§ 723. Statute of Virginia.
>
> Virginia passed an Act in 1779, as follows:
>
> 'Be it enacted by the General Assembly. That the Court of Admiralty to consist of three judges, any two of whom are declared to be a sufficient number to constitute a court, shall have jurisdiction of all maritime causes, except those wherein parties may be accused of capital offences, now depending and hereafter to be brought before them.'
>
> It was expressly provided that such court was to be 'governed in their proceedings and decisions by

> the regulations of the Congress of the United States of America; by the acts of the general assembly; by the laws of Oleron and the Rhodian and Imperial Laws, so far as they have been heretofore observed in the English Courts of Admiralty; and by the laws of nature and nations,'—a wide and beneficial jurisdiction. No one can fail to observe how distinctly the ancient ordinances and maritime laws, the civil law, and the former practices of the English Admiralty, are adopted instead of the narrow limit observed by the English Admiralty at that time." (p. 440).

The Admiralty jurisdiction in Virginia, (as followed by West Virginia) was thus predicated upon the ancient jurisdiction of the Admiralty Courts (civil law) rather than on the common law. Concededly, the former provided a remedy in an action for wrongful death.

Petitioner respectfully submits that this Court in *The Harrisburgh* erred in the following manner:

(1) The absence of proof of a different rule in the Admiralty of any country from that which it had on land stems not from lack of an Admiralty rule but because the maritime law of all non-English speaking people (Continental Europe) fused into and became part of the Roman Codes, the basis of the civil law as it was and still is practiced in Europe. As such—the remedies afforded by the Codes, some centuries before English law was promulgated, became those of the law of the sea as well.

(2) The apparent reason for the similarity of the rule in Admiralty and the common law rule in England was not a continuation of the remedies available under the civil law but rather the destruction and subversion of those rights by the common law Courts as part of the historic English political struggle of modification from an absolute to a constitutional monarchy, under the "enlightened" hand of Parliament and an established common law judiciary.

To consider the Admiralty rule as being similar to the English common law rule is self-contradiction. The bald fact is that the "death maxim" of the two systems is similar only because of the destruction of the ancient Admiralty jurisdiction in England.

(3) *Benedict on Admiralty*, as above set forth, clearly pointed out the wide chasm of legal thought existing between the mother country and her American colonies. Almost without exception each colony obtained a grant of power from the King far wider in scope than that offered in England. In effect the colonies, maritime traders, sought and received an enlightened Admiralty jurisdiction, harkening back to the ancient rules and principles of the civil law and its policy of natural justice and equity.

Waring v. *Clarke*, 46 U. S. 441 and *Insurance* v. *Dunham*, 78 U. S. 1, clearly pointed out the vast difference in thought between the two countries, differences that conclusively spelled out the desire of the framers of the Constitution to divorce the Admiralty jurisdiction from the bindings of the subservient Admiralty Courts of common law England.

The various lower Court decisions, so diligently discussed by the Court in *The Harrisburgh* grounded the grant of relief upon equity and justice, it is true, but predicated the belief of such "natural rights" upon the absence of a merger between Admiralty jurisdiction and the common law in the United States. Right or wrong, those decisions were not predicated upon a theoretical concept of justice as this Court implied, but on a proposition of law which concluded that the very merger of the two systems of law in England simply did ont occur in the United States.[5]

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[5] Even in England the Admiralty jurisdiction *in rem* was wholly different from that of the common law. This Court pointed out that *Vera Cruz*, 10 App. Cas. 59, had held the abatement rule in effect in Admiralty even after passage of England's Lord Campbell Act. Thus—a statute to modify the harshness of the "death maxim" at common law did not do so in Admiralty until a later date when the Act was revised to permit the cause of action to lie. Apparently, even in England, though there was a merger of the two systems, jurisdictional distinctions were still the subject of legal conflict.

The Court in *The Harrisburgh* reasoned it to be "the duty of courts to declare the law, not to make it * * *." (p. 214). The implication of dissatisfaction with *The Harrisburgh* result appears clear. However this Court interpreted the extent of its equitable powers in 1886, recent determinations have left little doubt but that a policy of equitable and natural justice may now be considered in arriving at a desired result.

In *Funk* v. *United States*, 290 U. S. 371, the opinion of Mr. Justice Sutherland gave meaning to the thought of modification of the rules of the common law by the judiciary when necessary to bring that law into alignment with changing concepts of justice and equity.

> "With the conclusion that the controlling rule is that of the common law, the Benson case and the Rosen case do not conflict; but both cases reject the notion, which the two earlier ones seem to accept, that the courts, in the face of greatly changed conditions, are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions" (p. 379).
>
> * * * The conclusion which the court reached was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the great weight of judicial authority which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law was within the power of the courts to declare and make operative" (p. 380).
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> • • •
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> "The rules of the common law which disqualified as witnesses persons having an interest, long since, in the main, have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such

persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. * * *" (p. 380).

"It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion, it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? That this court has the power to do so is necessarily implicit in the opinions delivered in deciding the Benson and Rosen cases. And that implication, we think rests upon substantial ground * * *" (pp. 381, 382).

"That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist we think is not fairly open to doubt (p. 382).

In Hurtado v. California, 110 U. S. 516, 530, this court, after suggesting that it was better not to go too far back into antiquity for the best securities of our liberties, said (p. 382):

* * *

> 'This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.
>
> '* * * and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that

the new and various experiences of our own situation and system will mould and shape it into new and and not less useful forms' " (pp. 382, 383).

• • •

"To concede this capacity for growth and change in the common law by drawing 'its inspiration from every fountain of justice,' and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin.

The final question to which we are thus brought is not that of the power of the federal courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts, in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions" (p. 383).

" • • • The common law by its own principles adapted itself to varying conditions and modified its own rules so as to serve the ends of justice as prompted by a course of reasoning which was guided by these generally accepted truths. One of its oldest maxims was that where the reason of a rule ceased, the rule also ceased, and it logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased, and perhaps another sprang up in its place

> which was based upon reason and justice as then conceived. No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself.'
>
> That court then refers to the settled doctrine that an adoption of the common law in general terms does not require, without regard to local circumstances, an unqualified application of all its rules; that the rules, as declared by the English courts at one period or another, have been controlling in this country only so far as they were suited to and in harmony with the genius, spirit and objects of American institutions; and that the rules of the common law considered proper in the eighteenth century are not necessarily so considered in the twentieth. 'Since courts have had an existence in America,' that court said (p. 708), 'they have never hesitated to take upon themselves the responsibility of saying what are the proper rules of the common law' " (p. 384).

In *Duplex* v. *Deering*, 254 U. S. 443, a matter involving the interpretation of the Clayton Act, the dissent of Mr. Justices Brandeis, Holmes and Clarke (which later became the majority view), was grounded upon this thought:

> "The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life." (p. 481)

In *Woods* v. *Lancet*, 303 N. Y. 349, the question involved was whether a cause of action would lie for personal injuries sustained by an unborn child. On appeal to the Court of Appeals of New York from an affirmance by the Appellate Division dismissing the complaint, the Court, reversing a principle of law in existence from the time of medieval England, declared:

"* * * They justify the statement in Prosser on Torts, at page 190, that: 'All writers who have discussed the problem have joined in condemning the existing rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and urging that recovery should be allowed upon proper proof.'

What, then, stands in the way of a reversal here? Surely as an original proposition, we would, today, be hard put to it to find a sound reason for the old rule. Following Drobner v. Peters (supra) would call for an affirmance but the chief basis for that holding (lack of precedent) no longer exists. And it is not a very strong reason, anyhow, in a case like this. Of course, rules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tort-feasor who surely has no moral or other right to rely on a decision of the New York Court of Appeals? Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. Our court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it (Rumsey v. New York & N. E. R. R. Co., 133 N. Y. 79, 85, 86, and see Klein v. Maravelas, 219 N. Y. 383.) That opinion notes that Chancellor Kent, more than a century ago, had stated that upwards of a thousand cases could then be pointed out in the English and American reports 'which had been overruled, doubted or limited in their application', and that the great Chancellor had declared that decisions which seem contrary to reason 'ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.' And Justice Sutherland, writing for the Supreme Court in Funk v. United States (290 U. S. 371, 382), said that while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wis-

dom and justice rather than 'with some outworn and antiquated rule of the past'. No reason appears why there should not be the same approach when traditional common-law rules of negligence result in injustice (see Hagopian v. Samuelson, 236 App. Div. 491, 492, and see Justice Stone's article on 'The Common Law in the United States', 50 Harv. L. Rev. (1936), pp. 4-7).

The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. Winfield's answer to that (see U. of Toronto L. J. article, supra, p. 29) will serve: 'if that were a valid objection, the common law would now be what it was in the Plantagenet period.' And we can borrow from our British friends another not: 'When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them 'undeterred' (Lord Atkin in United Australia, Ltd. v. Barclay's Bank, Ltd. (1941), A. C. 1, 29). We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.

The same answer goes to the argument that the change we here propose should come from the Legislature, not the courts. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." (pp. 354, 355).

Petitioner respectfully submits that the abatement rule of the common law has no place in the Maritime setting, either as a proposition of law or as a matter of social policy. As such—the Court may now (as set forth by Mr. Justice Sutherland in *Funk* v. *United States*, 290 U. S. 371) declare and effectuate a present rule in the light of fundamentally altered conditions. Petitioner prays that this Court will now declare an interment of the common-law "death maxim" as it may apply to the facts of the present case.

POINT II

Under the Wrongful Death Statute of West Virginia, maritime and not local principles of law were applicable with respect to the issues of assumption of risk and the duties of the litigants.

Assuming *arguendo*, that the general maritime law does not afford a remedy, "'where death—results from a maritime tort, committed on navigable waters within a state whose statutes give a right of action for wrongful death, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given.' *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242." *Tungus* v. *Skovgaard*, 358 U. S. 588, 591.

The District Court's finding of fact of Carbide's negligence was predicated upon Carbide's knowledge of the conditions prevailing aboard the vessel at the time it was brought in for repair, that it knew that the operation carried on by the deceased and others would involve many men working on the barge, that under the circumstances it had the duty to provide reasonably suitable rescue equipment on the barge in order to furnish the workmen with a safe place to work, that the absence of such safety equipment was the proximate cause of Goett's death.

Concedely, the West Virginia Wrongful Death Statute permitted a right of action grounded upon Carbide's negligence. This Court in the *Skovgaard* case on page 594, considered the question as settled. In *Holley* v. *S.S. Manfred*, #7822, decided July 9, 1959 (not reported to date), the Court of Appeals for the Fourth Circuit upheld the right to bring suit for tortious conduct under the Wrongful Death Statute of Virginia, which had language similar to that of the West Virginia Statute.

The Court of Appeals held that Carbide's duty was only to warn Goett of a "hidden danger or latent

defect",[5] that delivery of the barge to Amherst negated Carbide's duty to provide a safe place to work, which duty then transferred over to Amherst.

Thus, the destruction of liability was grounded upon the application of the discarded doctrine of duty only to warn, associated with the principle of assumption of risk as a complete bar to recovery (the duty to provide reasonably safe conditions did not extend to patent defects which a workman would know of and would therefore assume—to his complete detriment).

The duty of a shipowner to provide employees of contractors with a safe place to work has been laid down time and time again as a governing principle of maritime law. *Holley* v. *S.S. Manfred, supra*; *Skovgaard* v. *Tungus*, 252 F. 2d 14, affirmed by the Supreme Court, 358 U. S. 588; *Puleo* v. *H. E. Moss*, 159 F. 2d 842 (6th Cir.); *Grillo* v. *Royal*, 139 F. 2d 237 (2d Cir.); *Militano* v. *United States*, 156 F. 2d 599 (2d Cir.); which is not discharged by any concurrent duty upon the worker's employer. *McFall* v. *Belge*, 304 N. Y. 314; *Fodera* v. *Booth*, 159 F. 2d 795 (2d Cir.); *Anderson* v. *Laurentzen*, 160 F. 2d 173 (2d Cir.); *Feinman* v. *Bull*, 211 F. 2d 293 (3rd Cir.).

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[5] No law was cited in support of the principle.

[6] In *Holly* v. *S.S. Manfred*,—F. 2d —, the Fourth Circuit clearly set forth its belief that the reason for the existence of the state Wrongful Death Statute was to destroy the immunity of the wrongdoer under the common law. The statute did not predicate liability upon application of local as distinguished from maritime law, but simply on whether there would have been a recovery, had the decedent only been injured. Thus—the duty owed to GOETT by CARBIDE was grounded upon maritime principles and not the local state law.

Byrd v. *Napoleon*, 125 F. Supp. 573, affirmed 227 F. 2d 958 (5th Cir.), stated that the general principles of negligence law under the general maritime law and Louisiana State law were the same. *Allen* v. *Matson*, 255 F. 2d 273 (9th Cir.) held that the duty resting upon the parties was the same whether under maritime law or state law, apparently accepted by this Court in *Romero* v. *International*, 358 U. S. 354, at p. 376, footnote 44.

In *Halecki v. United*, 251 F. 2d 708, opinion by Honorable Learned Hand, as affirmed by this Court, 358 U. S. 613, the duty of the shipowner to ascertain that the methods and manner of the operation was safe for those engaged throughout the entire operation was affirmed.

> "The deceased was certainly an 'invited person,' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but although the work was let out to a subcontractor, also for any lack of 'reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities.' Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the 'methods and manner' of its use were proper" (p. 711).

And in this Court:

> "As to the claim based upon negligence, for which the New Jersey Wrongful Death Act clearly gives the right of action, we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a verdict.' The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. It was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use" (pp. 618-619).

The opinion of the District Court in the case at bar was entirely consistent with the *Halecki* rulings by the Court of Appeals and by this Court.

The Court below held that the shipowner could not be charged with the duty to overseer the safety of workers, even when aware of the prevailing conditions, and dis-

missed that obligation by holding that the delivery of the vessel discharged the owners from any further responsibility. The District Court's finding of fact charging Carbide with knowledge was thus reversed, though clearly not erroneous and supported by evidence that Carbide was well aware of the lack of safety rescue equipment, that it inspected the vessel after its delivery, for the purpose of discussing and pointing out the work to be done.

As such, the ruling of the Court below should be reversed as conflicting with the decision of this Court in *McAllister* v. *United States*, 348 U. S. 19, which laid down the "clearly erroneous" doctrine of the Federal Rules as being applicable in an Admiralty suit.

Carbide, having such knowledge and owing the duty to provide Goett with a safe place to work, was the common law doctrine of assumption of risk as a complete bar, or the doctrine of comparative negligence in its Maritime setting, applicable?

In *Holley* v. *S/S Manfred* (4th Cir.), the Court held that the Wrongful Death Statute of Virginia, having language similar to that of West Virginia (if death had not ensued)[7] would permit the maritime doctrine of law to govern as the only consistent construction in view of

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[7] Code of Virginia. "Article 3. Death by Wrongful Act. Sec. 8-633. Action for death by wrongful act.—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony. * * *"

the fact that the maritime worker would have had that right if only injured. In so holding, the Court cited and quoted the *Halecki* decision with approval.[8]

The doctrine of assumption of risk, as such, has been uniformly rejected by the Admiralty jurisdiction. *Panama* v. *Johnson*, 289 F. 964, affirmed 264 U. S. 375; *Sanford* v. *Caswell*, 200 F. 2d 830; *Becker* v. *Waterman*, 179 F. 2d 713; *Armit* v. *Loveland*, 115 F. 2d 308; *Seeandbee*, 102 F. 2d 577; *Pittsburgh* v. *Palo*, 64 F. 2d 198; *The Calvert*, 51 F. 2d 494; *New Berne*, 80 F. 2d 244, extended to maritime workers, *Palermo* v. *Luckenbach*, 355 U. S. 20; *Imperial* v. *Drlik*, 234 F. 2d 4.

The sole factual question is whether Goett had a free choice of safe or unsafe tools or method of performing his duty and voluntarily chose the unsafe tool or method. Under such a test, Goett could not be guilty of comparative negligence, since he was the unfortunate victim of a total lack of any safety equipment, without choice, voluntary or otherwise.

The fact that Goett may have known of the condition and continued working should not mitigate damages. In the *New Berne*, 80 F. 2d 244 (4th Cir.), the Court below thoroughly discussed the argument that continuation of employment was an assumption of risk:

> "To say that the servant assumes the risk of the master's negligent failure to provide him safe and suitable appliances with which to work, because he

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[8] The West Virginia Courts have approved and followed the construction placed on the Virginia statute, similar to its own. *Kelley* v. *Railroad*, 58 W. Va. 216; *Yeater* v. *Jennings*, 75 W. Va. 346. See also: *Woodell* v. *West*, 38 W. Va. 23, for a further discussion that the doctrine of assumption of risk in wrongful death actions follows the legal remedy available in injury cases.

The West Virginia Wrongful Death Statute has been termed "remedial" to be given a liberal construction "which rights a very ancient and very cruel wrong". *Rybold* v. *Jarrett*, 112 F. 2d 642 (4th Cir.).

> does not exercise the theoretical freedom of choice to leave the employment, is little short of mockery of the economic necessity which requires him to work with any appliances which may be provided. Instead of adopting the common law rule in admiralty, the rule of admiralty should be adopted by the common law, so that one whose negligent failure to provide safe appliances has resulted in injury to an employee should not be allowed to escape liability on the plea that the employee voluntarily assumed the risk of such negligence" (p. 248).

As such, there was no basis for the reversal of the District Court's finding of total absence of contributory negligence and assumption of risk, under the substantive law of the West Virginia Wrongful Death Statute.

The District Court having found that Carbide, having knowledge of the condition prevailing and the manner and method of the operation, in failing to provide Goett with rescue equipment, in failing to provide him with a safe place in which to work unqualified by any defense of assumption of risk or contributory negligence, was negligent, the determination of the Trial Court should have been maintained.

POINT III

The Wrongful Death Statute of West Virginia provided a remedy for breach of the warranty of seaworthiness.

The right of a state to modify or supplement the maritime law was confirmed in *Western v. Garcia*, 257 U. S. 233, at page 241, limited however, by the inability of the state to change the general features of the maritime law so as to defeat uniformity.

This Court has repeatedly declared that locale of the accident (the high seas or navigable waters within state territory) establishes Admiralty jurisdiction.

Claims affecting maritime workers and questions of scope of their rights and liabilities were within the Admiralty jurisdiction and were not of local concern, *Robins* v. *Dahl*, 266 U. S. 449; *Gonsalves* v. *Morse*, 266 U. S. 171; *Baizley* v. *Span*, 281 U. S. 222; *The Jefferson*, 215 U. S. 130; *Great Lakes* v. *Kierejewski*, 261 U. S. 479. In *Atlantic* v. *Imbrovek*, 234 U. S. 52 and *Atlantic* v. *Szczesek*, 234 U. S. 63, companion cases arising out of the same maritime tort, one for personal injuries, the other for wrongful death pursuant to the state statutory remedy, the identic character of both actions was affirmed.

City of Norwalk, 55 F. 98 (discussed with approval by this Court in *Just* v. *Chambers*, 312 U. S. 383) discussed the Wrongful Death Statute of New York and stated that the cause of action was still the creation of the maritime law, that the state statute gave rise only to a right of action, but that the case was no less maritime in its essential.

> "'The state statute does not create the *cause* of action. It does, indeed, create a new *right* and liability; but it does not create a single one of the elements that make up the fundamental cause of action, that is, the essential grounds of the demand. All these elements exist independently of the statute, and are not in the least affected by it. It no more creates the wrong, or the damage, than it creates the negligence or the death; nor does it, as in the pilotage and double wharfage cases add anything to the damages sustained. It authorizes no recovery except for 'the pecuniary damages' already existing. It is apparent, therefore, that, as suggested by Mr. Justice Clifford in *Steamboat Co.* v. *Chase*, 16 Wall. 532, the statute does no more than 'take the case out of the operation of the common-law maxim that an action for death dies with the person.'
>
> The affect of the statute is to attach a new legal right and responsibility to a purely maritime transaction. But that does not make the case in its essential nature any the less a *maritime* case. Nor does

> the enforcement of the statute extend the jurisdiction of the court, any more than the giving of damages for the first time for injuries to a cargo of dynamite or petroleum would be an extension of jurisdiction because those articles were new to commerce." (p. 109).

As stated in *Skovgaard* on page 592, the Admiralty jurisdiction adopts the "State's right of action" for wrongful death, enforcing the right "as an integrated whole, with whatever conditions and limitations the creating State has attached." However, while state law may at time supplement or modify the general maritime law, it cannot contravene the purpose of, work material prejudice to, or interfere with, the essential characteristics and harmony and uniformity of said law in its international and interstate relationships. *Romero* v. *International*, 358 U. S. 354, at page 373; *Just* v. *Chambers*, 312 U. S. 383; *Roanoke*, 189 U. S. 185; *Washington* v. *Dawson*, 264 U. S. 219; *Spencer* v. *Hicks*, 285 U. S. 502; *Union* v. *Erickson*, 248 U. S. 308; *DiSanto* v. *Pennsylvania*, 273 U. S. 34. See also: *Jansson* v. *Swedish*, 185 F. 2d 212; *Rogers* v. *City*, 285 F. 362; *Kuhn* v. *City*, 274 N. Y. 118; *Riley* v. *Agwilines*, 296 N. Y. 402; *McFall* v. *Belge*, 304 N. Y. 314.

The District Court, holding Carbide negligent, further found the vessel to be unseaworthy by reason of the absence of rescue equipment. Finding Carbide liable with fault, the Court declared that the doctrine of liability without fault was unnecessary to the result of the case.[9] The Court of Appeals did not determine whether the West Virginia Statute permitted an action for unseaworthiness since it reversed the Trial Court's findings and held the vessel seaworthy and further held that Goett

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[9] The Court held the doctrine of liability without fault inapplicable, apparently with the thought that if fault was established, proof of liability without fault was immaterial. As such the District Court seemingly confused the terminology, "liability irrespective of fault" with "liability without fault."

did not come within the class of workers entitled to the benefits of the doctrine.

The Court of Appeals in *Holley* v. *S.S. Manfred, supra*, implied approval of the Court of Appeals ruling in *Skorgaard* v. *Tungus*, 252 F. 14, affirmed by this Court, 358 U. S. 588, that the phrase "wrongful act, neglect or default" in a state Wrongful Death Statute permitted an action to lie for breach of the warranty of seaworthiness. As such following the procedure set forth by this Court in the *Skorgaard* decision, it would appear settled that the West Virginia Wrongful Death Statute, following the Virginia Statute, did permit an action for the breach of Carbide's duty to provide safety rescue equipment.

POINT IV

The shipowner, with knowledge that workers were to come aboard its vessel, breached its warranty of seaworthiness by failing to provide safety rescue equipment on the ship upon its delivery to the independent contractor for the work to be thereafter performed.

The Trial Court's finding of fact that the vessel was unseaworthy was predicated upon the admitted absence of any rescue equipment aboard the vessel. Carbide's duty was to provide Goett, a business invitee, with a seaworthy vessel, *Halecki* v. *United*, 251 F. 2d 708, as affirmed by this Court, 358 U. S. 613 on p. 617, the duty being non-delegable and absolute. *Osceola*, 189 U. S. 158; *Mahnich* v. *Southern* 321 U. S. 96; *Seas* v. *Sieracki*, 328 U. S. 85, and *Pope & Talbot* v. *Hawn*, 346 U. S. 406, extended by this Court in *Alaska* v. *Petterson*, 347 U. S. 396, and *Rogers* v. *United States*, 347 U. S. 984, to periods subsequent to delivery of the vessel to an independent contractor for work in furtherance of the shipowner's business.

The reason advanced by the Court of Appeals for its decision was that no rescue equipment was required on

the vessel, unmanned during transit, hence the absence of what wasn't necessary during one operation could not make the vessel unseaworthy when it was necessary during another.

Rogers v. *United States*, 347 U. S. 984, established liability to a shipowner for equipment brought aboard the vessel by the independent contractor without the knowledge of the shipowner and without the latter even knowing of the equipment's existence. In *Poignant* v. *United States*, 225 F. 2d 595 (2d Cir.), the Court held that the duty to provide a seaworthy vessel continued for all periods and not only at the commencement of the voyage.

The case of *Pope & Talbot* v. *Hawn*, 346 U. S. 406, affirmed *Sieracki*, *supra*, in holding that the doctrine of seaworthiness applied to a carpenter doing repair work aboard defendant's vessel:

> "Sieracki's legal protection was not based on the name 'stevedore' *but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness.* The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the *stevedores* then working with him on the ship *or of seamen* who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law" (pp. 412-413).

In the case of *Alaska* v. *Petterson*, 205 F. 2d 478, aff'd 347 U. S. 396, the Supreme Court affirmed its ruling in the *Sieracki* and *Hawn* cases, *supra*.

Petterson, a longshoreman, was injured while working aboard ship by an unseaworthy block, brought aboard by his employer, the stevedoring company. The decision of

the United States Court of Appeals, 205 F. 2d 478, affirmed by the Supreme Court, distinguished the doctrines of seaworthiness and negligence in stating that seaworthiness was a "specie of strict liability regardless of fault." The Court declared (p. 479):

> "If the block was being put to a proper use in a proper manner, as found by the district judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy.
>
> In making this inference we do not rely upon the tort doctrine of res ipsa loquitur, although the result is similar. Res ipsa loquitur is a doctrine of causation usually applied in cases of negligence. Here we are dealing with a specie of strict liability regardless of fault. Seas Shipping Co. v. Sieracki, supra, 328 U. S. at page 94, 66 S. Ct. 872. It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, see O'Mara v. Pennsylvania R. Co., 6 Cir., 95 F. 2d 762; or that the result would not have occurred, unless someone were negligent, see Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365. It is only necessary to show that the condition upon which the absolute liability is determined — unseaworthiness — exists. Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561. That has been shown here."

Further discussing the interpretation placed upon the *Sieracki* decision regarding the "relinquishment of control" doctrine, the Court concluded that said doctrine, based upon an incorrect premise, was incorrect and unacceptable.

> "Judge Hand was correct in his interpretation of the Sieracki case as assimilating a longshoreman to the position of a seaman insofar as injuries received while on board ship are concerned. This is shown by the reference in the Sieracki opinion to the 'common core of policy which has been controlling' which is found running through the deci-

> sions permitting longshoreman to recover from shipowners 'that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, *regardless of the fact that he is employed immediately by another than the owner*' • • •. It cannot be assumed that the Court meant that the stevedore should lose this protection merely because his immediate employer had temporarily assumed control of a portion of the ship without becoming the owner *pro hac vice*.
>
> The liability of the shipowner to the seaman for injuries resulting from unseaworthiness does not depend upon negligence. It is absolute • • •. That this absolute duty is also owed to stevedores is clearly shown by the Sieracki case. See also Kulukundis v. Strand, 9 Cir., 202 F. 2d 708, 710. The analysis of the relinquishment of control doctrine above made shows that its major premise is that the liability of the shipowner to the stevedore is based upon negligence. We have shown that major premise to be incorrect; thus the entire doctrine is incorrect, and it should not be applied here'' (p. 480).

Petitioner submits that this Court, by its determinations in the *Hawn*, *Petterson and Rogers* cases, *supra*, has fully answered the question that existed with respect to liability as dependent upon "control" of the vessel at the time of accident.

The principles of law as laid down by the Supreme Court can lead to but one conclusion in the case at bar—that the question of seaworthiness of the vessel, an issue of fact, cannot be determined on the basis of "control".

Thus, the non-delegable, absolute duty of Carbide under the doctrine of seaworthiness, upon principles of the general maritime law, continuing although the vessel was moored and under the supervision of Amherst, existed at the time of the decedent's death.

In *Lester* v. *United States*, 234 F. 2d 625, the Court of Appeals for the Second Circuit relied upon the cases of

Alaska v. *Petterson*; *Pope & Talbot* v. *Hawn* and *Seas* v. *Sieracki*, *supra*, for the proposition that the doctrine of seaworthiness was extended to shore based harbor workers who were injured while working aboard a vessel, moored or in drydock.

Ross v. *S. S. Zygland*, 240 F. 2d 820 (4 Cir.), involved a claim for personal injury by a night watchman when he tripped on a wire. In affirming a decree for the libelant, the Court below held:

> "A vessel and her owner are liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or a failure to supply and keep in order the proper appliances appurtenant to the ship. The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760; Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561. This obligation of the shipowner has been extended to benefit longshoremen and carpenters who are injured in the course of their employment while aboard the ship, even thought they were employed by independent contractors. Seas Shipping Co., Inc. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143. The owner's absolute duty to provide a seaworthy vessel, with appurtenant appliances and equipment, is not affected by relinquishment of control to another. Alaska Steamship Co., Inc. v. Petterson, 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798, affirming Petterson v. Alaska S. S. Co., 9 Cir. 205 F. 2d 478; Rogers v. United States Lines, 347 U. S. 984, 74 S. Ct. 849, 98 L. Ed. 1120, reversing Rogers v. United States Lines, 3 Cir. 205 F. 2d 57. Those cases hold that the owner is liable for defects in equipment brought aboard by a stevedore and used under the stevedore's sole control. The doctrine of seaworthiness has also been extended to include improper stowage of cargo, causing personal injuries. Palazzolo v. Pan-Atlantic S.S. Corp., 2 Cir. 211 F. 2d 277, 279; The State of Maryland, 4 Cir. 85 F. 2d 944, 947, and cases cited. Cf. Berti v. Compagnie De Nav. Cyprien Fabre, 2 Cir. 213 F. 2d 397" (p. 822).

* * *

"The crucial consideration is whether the ship was, in all respects pertinent to the injury, reasonably fit to permit libellant to perform his task aboard the ship with reasonable safety. Lester v. U. S., 2 Cir. 234 F. 2d 625, 628" (p. 822).

See also: *Hunt* v. *United States*, 17 F. Supp. 578, aff'd 91 F. 2d 1014; *Hawn* v. *American*, 107 F. 2d 999; *Carumbo* v. *Cape*, 123 F. 2d 991; *The Falco*, 20 F. 2d 362; *Weaver* v. *Pittsburgh*, 153 F. 2d 597; *United States v. Lindgren*, 28 F. 2d 725 (4th Cir.), aff'd 281 U. S. 38.

Carbide delivered the vessel to Amherst for the maintenance and repair work, knowing the working conditions which would prevail aboard her. The shipowner could not escape the duty placed upon it by the simple expedient of delegating work to others. *Seas* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot* v. *Hawn*, 346 U. S. 406; *United* v. *Halecki*, 358 U. S. 613. The fact of change of condition aboard the vessel could not negate Carbide's duty.[10]

POINT V

The shipowner's warranty of seaworthiness encompassed employees of an independent contractor after delivery of the vessel for its periodic painting and minor repairs, work traditionally performed by seamen.

Petitioner respectfuly submits that Carbide's duty to provide a seaworthy vessel was no less in force than it was when the vessel was in transit, provided that Goett

[10] *Lester* v. *United States*, 234 F. 2d 625, cited by the Court below in support of its ruling involved nothing more than a factual holding by the Court of Appeals that the Trial Court was incorrect in finding that a repair contract calling for replacement of a railing *per se* rendered the vessel unseaworthy if an accident occurred involving the absence of the railing. The appellate court expressly ruled that the doctrine of seaworthiness was applicable during the repair period. As such, the *Lester* case is diametrically opposite to the ruling of the Court of Appeals in the case at bar.

came within the class of workers performing work traditionally done by seamen.

Goett was entitled to the protection of the doctrine of seaworthiness if he was performing "work traditionally done by members of the crew." *United* v. *Halecki*, 358 U. S. 613.[11]

The work to be done on the vessel, set forth in the contract between Carbide and Amherst, consisted of sandblasting and painting the vessel and "minor repairs" (Pet. Ex. 12, p. 207). The minor repair was the replacement of butterworth hatches.[12] The entire contract price was $4,712.60, of which 24 hatches at $55.88 per hatch amounted to $1,341.12.

Goett was sandblasting the deck of the vessel at the time of his fall, an operation performed to prepare the deck for painting, the modern industrial way to take the paint down to the metal.

The seaman has, from time immemorial, painted his ship; he has traditionally and continues today to chip and scrape paint from the ship's surface preparatory to painting his vessel.

Evidence of the traditional duties of crewmen to paint, chip and scrape the vessel and its component parts is readily available in the various agreements between the seamen's unions for unlicensed personnel and shipowners throughout the nation. See: Working agreement of the National Maritime Union of America, dated June 16, 1956 on pp. 34, 63, 83, 84, 86, 87, 89, 95, 106; agreement of the

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[11] This appears to be the very question posed by the *amicus curiae* brief of the United States in the *Halecki* case, not reached by the Court. See footnote 7, at p. 618.

[12] Small openings leading to the internal self cleaning system of the vessel.

Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association at pp. 43-47.

The situation herein is not factually consistent with that of the *Halecki* case. As the Court pointed out, Halecki was doing work of the specialist subcontractor, who was brought aboard the ship specifically to clean the ship's generator which were being dismantled and overhauled. The Court pointed out that crewmen had to leave the ship during use of the carbon tetrachloride in the operation. Of course, that was not the case herein since there was an entire gang aboard the ship doing other necessary preparation for the painting operation and who were to remain on the ship to complete the contract.

Further, the work in *Halecki* necessitated that the entire ship be "dead" for the cleaning operation which Halecki was performing, an operation foreign to "what any crew member had ever done on this ship or on anywhere else in the world * * *" (p. 618).

The absence of a crew during transit periods necessitated the delivery of the vessel to Amherst for the work, not the unique nature or the degree of knowledge involved in the work. As such, Goett, doing what seamen could and would customarily do was entitled to the same protection from the hazards involved, the protection of safety rescue equipment. *Sadler* v. *Pennsylvania*, 159 F. 2d 784 (4th Cir.); affirmed by the Court below in the case at bar (R. 249).

Petitioner submits that the right of a cause of action for unseaworthiness was afforded by the West Virginia Wrongful Death Statute, that the vessel was unseaworthy by reason of absence of safety rescue equipment at the time of Goett's death (unqualified by the delivery of the vessel to Amherst) and that Goett was within the class of workers doing the traditional duties of seamen to whom flowed the protection of the warranty of seaworthiness.

Petitioner submits that Carbide was and is legally responsible for the breach of that duty.

POINT VI

In this action for wrongful death of a maritime worker arising out of a maritime tort and predicated upon the general maritime law as supplemented by the Wrongful Death Statute of West Virginia, the State statutory maximum monetary limitation was unenforceable as being contrary to the essential characteristics of the general maritime law and against its public policy of uniformity in its international and interstate relations.

The rights and liabilities of litigants arising out of a maritime tort ordinarily depends upon the acceptance and application of the State Statute by the Admiralty Courts, which are controlling, wherever suit may have been instituted. *Western* v. *Garcia, supra,* at page 241. The Admiralty *forum* must adopt the State Statute in every respect qualified only by its right as the *forum* to refuse to enforce statutory enactment against the policy of the Admiralty jurisdiction in its effort to insure proper harmony and uniformity in its international and interstate relations. *Lottawanna,* 88 U. S. 558; *Workman* v. *New York,* 179 U. S. 552; *Knickerbocker* v. *Stewart,* 253 U. S. 149.

As stated in *Romero* v. *International,* 358 U. S. 354, "State law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system" (p. 373).[13]

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[13] Seemingly not dissimilar to the right of a *forum* to refuse to enforce a statute of the *lex loci* contrary to the public policy of the *forum.*

"In such a case as this it is incumbent upon the Admiralty to enforce the . . . (*lex loci*) . . . statute 'just as it would one originating in any foreign jurisdiction.' *Levinson* v. *Deupree,* 345 U. S. 648, 651." *Tungus* v. *Skovgaard, supra,* at page 595.

Restatement on Conflicts of Law, § 612, pages 731-732:

"§ 612. Action Contrary to Public Policy.

No action can be maintained upon a cause of action created in another state the enforcement of which is con-

The District Court ruled that the $20,000.00 maximum monetary limitation of the West Virginia statute was applicable in actions of this nature.

The Court of Appeals did not specifically rule upon the issue since it was unnecessary to its holding.[14]

Query: Does the monetary limitation set forth in the West Virginia Statutes, §5475(6), contravene the policy of the maritime law.

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trary to the strong public policy of the forum.
Comment:

a. Distinction between policy denying access to courts and policy refusing to apply foreign rule of law. The rule stated in this Section is applicable when the entire basis of the claim upon which suit is brought is so contrary to the public policy of the forum that it will withhold altogether the use of its courts to enforce the claim. A distinction is to be noted between such a policy and the policy which, while it does not require denial of access to the courts of the forum, nevertheless requires the courts to apply certain local rules in the course of the litigation to enforce the local notions concerning the manner and method in which the courts of that state should function. This latter policy may be called the procedural policy of the forum. This procedural policy differs from the policy which denies access to the local courts under the rule stated in this Section in the following respect: in the former case, the legal relations between the parties as determined by the foreign law will be enforced subject to certain limitations imposed by local rules; in the latter situation the state refuses altogether to enforce the legal relations created by the foreign law."

Poling v. *Poling*, 116 W. Va. 187 (1935), held that rights created or recognized by the *lex loci* must give way when in conflict with law or public policy of the *lex fori*, that the public policy of the later meant "the law of the state, whether found in the constitution, statutes, or judicial records" (p. 192).

See also: *McKnett* v. *St. Louis*, 292 U. S. 230; *Loucks* v. *Standard*, 224 N. Y. 99; *Herzog* v. *Stern*, 264 N. Y. 379; *Weissengoff* v. *Davis*, 260 F. 16 (4th Cir.); *The Titanic*, 233 U. S. 718, at pp. 732-733; *Black Diamond* v. *Steward*, 336 U. S. 386.

[14] The Court below stated generally that the substantive law of the state involved must be accepted and cited *Quinette* v. *Bisso*, 136 F.

Workman v. *New York*, 179 U. S. 552, a libel by the shipowner resulting from a collision between his vessel, moored at a City dock, and a City owned fireboat, involved a sovereign, exempt from suit except by statutory permission and which, by municipal law, limited liability. This Court upheld the doctrine that the general maritime law, as a constitutional grant of power, controlled the issue of monetary limitation; that to permit local law to limit recovery would be destructive of the essential characteristics and uniformity and harmony of the Admiralty jurisdiction, which would result in the "practical destruction of a uniform maritime law".

> "The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principals of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one

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825, as controlling the issue of limitation of damages. *Quinette* was nothing more than a statement that the Court favored looking to the recoveries granted by the State Courts under similar facts and circumstances in the assessment of damages. The case did not concern a monetary limitation under a Wrongful Death Statute since the sum awarded was only $4,000.00.

If this Court determines that the "death maxim" was applicable, that Goett's sole remedy was pursuant to the Wrongful Death Statute of West Virginia, but that the statutory maximum recovery section of the Act was inapplicable, petitioner submits that the cause should then be remanded to the District Court for further findings of damages only.

The West Virginia Statute permitted recovery for loss of future support and for mental anguish of the widow. It did not permit recovery for pain and suffering of the decedent prior to death or for nurture. As such, the District Court finding of damages for Goett's pain and suffering and nurture would be stricken and a further finding of damages made for the mental anguish of Goett's widow.

Port of the United States and a different thing in some other Port. As the power to change state laws or state decisions rests with state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed, would besides apply to other subjects specially confided by the Constitution to the Federal Government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution, it would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels." (p. 558). * * *

In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a State can deprive of all rights to relief, in a case where redress is afforded by the maritime law and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States." (p. 560).

The *Thielbek*, 241 F. 209, was an appeal in an admiralty suit by shipowners against each other and against the City of Portland, which arose out of a collision. The decree was in favor of one shipowner against the other and the city. The latter was engaged in pilotage and towage service under legislative enactment which had in its charter a limitation of liability of $10,000.00. The decree was for a sum greater than the limitation.

The Court, in affirming, held that local law or statutes could not abrogate or limit the amount of damages recoverable under the maritime law in a suit properly before an Admiralty Court.

See also: *Southern* v. *Jensen*, 244 U. S. 205, and *Knickerbocker* v. *Stewart*, *supra*, in which this Court affirmed the view that the state could not, by legislation, grant a compensation remedy to maritime workers in derogation of their maritime rights to damages; and *Moore-McCormack* v. *Amirault*, 202 F. 893; *Newburgh* v. *Texas*, 227 F. 2d 732, and *New Zealand* v. *Earnmoor*, 79 F. 368, in which the question of interest as a part of the recovery of damages was held to be controlled by maritime principles rather than by state legislation.

While the cases cited do not concern themselves with wrongful death statutes, the rule of law would seem to be in point, that a suit existing by virtue of statutory permission, and having a monetary limitation may not enforce the limitation as being contrary to the avowed policy of the Admiralty jurisdiction to insure harmony and uniformity in the essential characteristics of the maritime law.

Petitioner respectfully submits that the monetary limitation under the West Virginia legislation was unacceptable and unenforceable in this suit for wrongful death arising out of a maritime tort.

CONCLUSION

Petitioner respectfully prays that this honorable Court will reverse the ruling of the Court below and remand this matter to said Court for further proceedings in accordance with the facts and law above set forth.

Respectfully submitted,

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